BY
FRANKLIN

The A B of C PROHIBITION

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BY

FABIAN FRANKLIN

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THE
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CHAPTER I

MAJORITY AND MINORITY

We all believe in majority rule. But what do we mean when we say we believe in majority rule? Do we mean that whenever the majority think that a certain thing is desirable, it is right and proper for them to put that thing into the form of a law, which the minority will be compelled to obey?

Certainly no sane man, if he stops to think, can mean that. The majority might think it desirable that everybody should go to church three times every Sunday, or that nobody should ever go to church at all. They might think it desirable that there should be no dancing, or that nobody should waste his time in reading novels or in playing cards. They might think that everybody should be in bed by nine o'clock at night or out of bed by six o'clock in the morning. They certainly might think—for in some of our States they do think—that nobody should smoke cigarettes.

Now *some of these things* are things that even an overwhelming majority would not have the moral right to put into law and force upon the minority;

but *all of them* are things that it would be the height of folly and unreason to put into law unless they were backed by an overwhelming majority of the people. Right or wrong, desirable or undesirable, laws regulating the personal lives of people, laws restricting their personal liberty except for purposes manifestly necessary, if justified at all, are justified only when they represent the unmistakable demand of the community as a whole.

When we say that we believe in majority rule, we mean—if we are men of sense—that *within the proper limits of law and government* the majority should decide, and the minority should loyally accept the decision. We do not mean that there are *no limits* to what law and government may rightfully undertake to command. If we did, we should be subscribing to a doctrine every bit as intolerable as the doctrine of the divine right of an absolute monarch. Majorities have no more claim to a divine right to do as they please to *the rest of the people* than kings have to do as they please to *all the people.*

But this is not all. Not only do majorities not have the unlimited *right* to do as they please; they also do not have the unlimited *power* to do as they please. In this respect also they are like kings; for although we speak of absolute monarchies there

never has really been such a thing—at least not in modern times. Wise kings, whether "absolute" or not, when they found they had undertaken to impose upon the people something to which the people would not submit, did not get black in the face and swear they would never yield to disloyal subjects; they took the back track. Kings who didn't have the sense to see the limits of their power—kings like Charles I and James II in their relation to England, or like George III in his relation to America—simply rushed into destruction or disaster. And it is the same with majority rule as it is with monarchical rule.

Prohibitionists are in the habit of saying that the enforcement or non-enforcement of the Eighteenth Amendment will be a supreme test of democracy. They say that if we can't enforce it then democracy is a failure. Nothing of the kind. If our democracy can't enforce a law that an enormous minority (very possibly, indeed, a majority) resent as an outrage, it will be in no way different from a monarchy, or an aristocracy, or any other form of government. None of them can do that.

The Eighteenth Amendment *is* going to be a test of democracy, however; but in a way very different from what the Prohibitionists have in mind. It is not going to test whether democracy has as much *power*

as monarchy; it is going to test whether democracy has as much *wisdom* as monarchy. Only the most foolish and obstinate of kings have imagined that because they had once commanded a thing, however wrong or unworkable, they must stick to it to prove their power; and the question is whether we are going to be like those foolish and obstinate kings or whether we have sense enough to recognize that if we have committed an error we shall serve the cause of our country not by persisting in the error to show our power, but by correcting the error to show our wisdom.

CHAPTER II

THE EIGHTEENTH AMENDMENT AND THE TEN COMMANDMENTS

"Should the Eighteenth Amendment be Repealed?" was the question under debate at a public forum. Both sides were represented by prominent spokesmen. Interest was centered upon the widespread violation of the Prohibition law. After much threshing of disputable matters, the Prohibition speaker's voice rose to a height which indicated that he had reached a triumphant climax in his argument. Being a fair-minded man, he had admitted, as of course every fair-minded man must, that there is a vast amount of violation of the law. "Yes," he cried, "millions of people break the Prohibition law; but so do millions of people break the Ten Commandments. Do you propose to repeal the Ten Commandments?"

No, we do not propose to repeal the Ten Commandments; but neither do we propose to *enact* the Ten Commandments. They are not, and never have been, incorporated in the law of the land. They are not enforced by policemen and district attorneys and judges. Violation of them is not punished by fine

or imprisonment or outlawry. They are impressed upon the minds and consciences of the people as moral injunctions; but nobody proposes that they should be written into the statute books, and obedience to them imposed upon the people by force.

Laws against murder, laws against stealing, are, indeed so enforced, and they have been so enforced, time out of mind, among nations that had never heard of the Ten Commandments. These laws are enacted, and are enforced by governmental power, not because they are in the Ten Commandments, but because they are obviously necessary to the peace and security of the community. But there is no law on the statute books to punish lying, still less a law to punish covetousness; and if any one were to propose such a law in Congress its absurdity would be so obvious that the proposal would not provoke so much as the compliment of a laugh.

You can't tell whether a law is a good law or a bad law by simply asking whether the object which it aims to accomplish is good or bad. It would be a good thing if everybody told the truth; but it would be a horrible thing if the government were to undertake to compel everybody to tell the truth. In regard to nearly all of the Ten Commandments there

is a fairly universal feeling that the things which they enjoin are good and the things which they forbid are bad; yet no person of any intelligence would for a moment entertain the idea that it would be a good thing to force them upon the people by statutory penalties.

Accordingly, even if an overwhelming majority of the people of the country thought that total abstinence from intoxicating drinks was a desirable thing, it would not in the least follow that it would be a good thing to enact a law to force total abstinence from intoxicating drinks upon all the people of the country; for, even then, many extremely important questions would remain to be answered before you could say that such a law was desirable. Let me here name just a few of these questions:

1—Is this the kind of thing that ought to be imposed upon people by law, or the kind of thing that should be left to moral and social influences which bear upon the individual conscience?

2—Will the law, however well intended, be felt by large numbers of good and respectable people as a tyrannical interference with their personal life and personal liberty?

3—Can the law be successfully enforced?

4—Will the enforcement of the law necessitate

measures odious to a freedom-loving people, and create in the minds of thousands of excellent citizens a feeling of contempt and hatred for the law?

There has been a great deal of dispute as to whether the Eighteenth Amendment was or was not "put over" on the people; that is a subject which we may look into later on. But, whether it was "put over" or not, one thing is quite certain: Congress and the State Legislatures passed the Eighteenth Amendment without giving any serious attention to these questions; and the people at large were still less alive to them. It was put through in haste and we are repenting at leisure. If the people had realized then what nearly every sensible person realizes now in regard to these four questions, the Eighteenth Amendment would have had mighty hard sledding, instead of the easy time it had in going through.

CHAPTER III

THE STATES AND THE UNION

Prohibitionists are very fond of saying that the adoption of the Eighteenth Amendment involved no great change, that it was but the last step in a process which had been almost completed. A large proportion of all the States, they say, had already adopted Prohibition, and the number of such States was increasing rapidly.

When the statistical facts are carefully examined, it turns out that they do not really bear out this view; but I am not going to insist upon that. For the present, I am avoiding all kinds of statistical controversy, and trying to fix attention upon the large, the vital, the unmistakable, the fundamental, elements of the case.

Let us note, then, to begin with, a very remarkable circumstance, which everybody will recognize:

Before the Eighteenth Amendment was adopted, the Prohibition question was one that engaged public interest only in a very mild way. People rarely talked about it; nobody thought of it as one of the burning questions of the time. Ever since the Eighteenth

Amendment was put into the Constitution, on the other hand, Prohibition has been one of the chief topics of public discussion and of private conversation. It has been talked about, and thought about, twenty times as much as any other subject of public interest whatsoever. And year by year the feeling has been growing stronger and stronger that it presents a national problem of the utmost gravity.

Now, if the Eighteenth Amendment was merely the last step in a process that had been almost completed, this is surely a most extraordinary development. The drink question—Prohibition, local option, high license—had been agitated in the various States of the country for more than half a century. The States had gone backward and forward in the matter, trying first one thing and then another. The Eighteenth Amendment was to put an end to all this backing and filling; the country was to obtain freedom from unrest over the liquor question, through adopting completely the solution which had already been almost completely adopted. But nothing of the kind happened. Why?

The reason that nothing of the kind happened is that the Eighteenth Amendment was *not* merely the last step in a process which had been almost completed. When we passed from State Prohibition

to national Prohibition we did not simply complete the process that had been going on in the various States. On the contrary, we took a tremendous plunge into an entirely new state of things.

National Prohibition differs from State Prohibition in two vital points, each of them of immeasurable importance.

In the first place, so long as the drink question in each State was in the hands of the people of that State, the people felt that if Prohibition didn't work well in that State, or if a majority of its people didn't like it, they could, with a reasonable degree of effort, get rid of it, or modify it. A large State like New York or Illinois does indeed include many kinds of people; yet there is enough contact, enough neighborhood, enough community of interest, among them to give the experiences and the desires of any considerable proportion of its people real weight in determining the action of the whole. A very big minority might therefore patiently submit to what they regarded as an unwarrantable law imposed by the majority, in the hope that within a reasonable time they might get the law repealed or modified. Still more would that be the case in a State like Maryland or Rhode Island. But as soon as you make Prohibition a national law, all this is utterly changed. The citizens of New York or Maryland then no

longer feel that they can get rid of Prohibition if it works badly or if they change their mind about it. They know that in order to get the law changed they have to bring over to their way of thinking the people of States altogether different in conditions, desires, manner of living; people, too, who know nothing, and perhaps care less, about the way in which the law works in States a thousand miles away. To have their daily lives regulated, their personal habits interfered with, by the people of distant States, with little or no hope of relief, is a kind of thing which freemen cannot be expected to endure with patience.

The second point has to do not with the prospect of *repeal,* but with the possibility of *enforcement.* The enforcement of a law regulating the daily lives of people depends essentially upon the sentiment of the community immediately affected. So long as Prohibition was a State law, even if there was practically no hope of repeal, it commanded a large measure of respect among the people of the State as being the act of a majority of the people. Even then there were, of course, many who regarded it as wrong, even as tyrannical; yet on the whole it was pretty generally acquiesced in. There was no such open and intense hostility to it as has been displayed against the

national law. A conspicuous example of this is furnished by the State of Kansas, which was thoroughly committed to Prohibition long before the Eighteenth Amendment was passed. There is strong evidence to the effect that there is vastly more violation of the Prohibition law, and vastly more resentment against it, in Kansas since it has become a national law than there was when it was a State law.

It will be observed that I have said nothing whatever about the doctrine of State rights or of State sovereignty. Whatever result the Civil War may have had in regard to these abstract doctrines, it still left with us the practical distinction between the province of the States and the province of the nation. Especially did it leave wholly untouched the power of the individual States to deal with all matters relating to the ordinary concerns of life. This division of powers—this combination of State self-government in home concerns and national control in inter-State and national concerns—has been the very keystone of our system, the great practical contribution we have made to the art of government in a vast Republic. The enormous injury that national Prohibition is doing to this vital feature of our American system, any one can see for himself.

And all this time I have said not a word about national Prohibition being established not by an ordinary statute but by actually being made part of the Federal Constitution. How infinitely worse this makes the situation we shall see in the next chapter.

CHAPTER IV

BARTERING THE CONSTITUTION FOR A COCKTAIL

On or about Christmas day, 1922, the District Attorney of the United States at New York City felt moved to issue a statement in which he implored the people not to "barter their Constitution for a cocktail." But this pathetic appeal found no echo whatever in the bosoms of his stony-hearted fellow citizens. If they drank fewer cocktails than they had expected to, it was not because of any compunctions of conscience aroused by the District Attorney's words, but solely because the officers of the law, by strenuous exertions, made the getting of the cocktails more difficult or the dispensing of them more dangerous.

But District Attorney Hayward's phrase is worth pondering, all the same. For, in a very true sense, though not at all the sense which he intended, the Constitution *has* been bartered for a cocktail. The barter was effected when the Eighteenth Amendment was put into the Constitution. For then it was that the Constitution was lowered to the plane of dealing with cocktails.

The object of any Constitution like ours is to place beyond the reach of the ordinary processes of legislative change certain fundamental features of the government and certain fundamental rights of the people. The Constitution of the United States undertook to do this, and nothing more. It provided a certain framework for the Federal government which it created; it fixed the limits of the power of that government, as distinguished from the State governments; and it guaranteed certain essentials of liberty and property. It said nothing whatever about cocktails; and it commanded the kind of respect which a true Constitution is capable of commanding, and which no Constitution that undertakes to deal with cocktails can possibly command.

The purpose of the Eighteenth Amendment was to make impossible all practical thought of ever getting rid of Prohibition. No matter how ill it might work in the great cities, no matter how much it might be resented in ten, or twenty, or thirty of our States, no matter what a majority of the people might think about its folly or its tyranny, once it was in the Constitution it could not be got out of it, so long as thirteen of the forty-eight States—thirteen States, however small, however remote, however peculiar in

their conditions—persisted in adhering to the Eighteenth Amendment.

It was upon the hopelessness of this prospect that the Anti-Saloon managers counted as ensuring the acquiescence of all decent and law-abiding people in the thing which they had put through.

But the trick has not worked that way. On the contrary, the more it was insisted that the Eighteenth Amendment could never be repealed, the more it was felt that the Eighteenth Amendment was not morally binding on those who regarded it as an act of oppression and unreason.

The one great reason why an ordinary law that is oppressive and unreasonable commands the obedience of good citizens who oppose it is that, if it is as bad as they think it, there is a fair chance of getting it repealed. But this does not hold in the case of a law that is placed beyond the reach of argument, a law that is impervious to attack, however offensive its working. The light-hearted contempt with which the Eighteenth Amendment is treated by millions of good citizens is a phenomenon without a parallel in the history of free institutions. But there is nothing surprising about it. In making us a nation of lawbreakers, the Eighteenth Amendment has done only

what, by its very nature, it was calculated to do.

The framers of the Federal Constitution recognized the fact that there were some things which it was necessary to safeguard against the vicissitudes of public opinion from day to day, from year to year, even from decade to decade. These things were of three kinds and three kinds only: The division of powers as between the Federal government and the State governments; the structure of the Federal government itself; and the fundamental rights of American citizens. There was not to be any doubt from year to year as to the limits of Federal power on the one hand and State power on the other; nor as to the structure of the Federal government and the respective functions of the legislative, executive and judicial departments of that government; nor as to the preservation of certain fundamental rights pertaining to life, liberty and property. These things were not to be subject to disturbance except by the extraordinary and very difficult process of amendment prescribed by the Constitution.

Into this great instrument there was injected for the first time by the Eighteenth Amendment matter of a wholly different kind—not only a different kind but the opposite kind.

Whether Prohibition is right or wrong, wise or un-

wise, it is certainly a denial of personal liberty. Prohibitionists maintain that the denial is justified, like other restraints upon personal liberty to which we all cheerfully assent; anti-Prohibitionists maintain that this denial of personal liberty is of a vitally different nature from those to which we all assent. But every one admits that it is a denial of personal liberty; and to entrench a denial of personal liberty behind the mighty ramparts of our Constitution is to do precisely the opposite of what our Constitution—or any Constitution like ours—is designed to do.

The Constitution withdraws certain things from the control of the majority for the time being—withdraws them from the province of ordinary legislation—for the purpose of *safeguarding liberty:* the Eighteenth Amendment seizes upon the mechanism designed for this purpose, and perverts it to the diametrically opposite end, that of *safeguarding the denial of liberty.* All history teaches that liberty is in danger from the tyranny of majorities as well as from that of oligarchies and monarchies; accordingly the Constitution says: No mere majority, no ordinary legislative procedure, shall be competent to *deprive* the people of the liberty that is hereby *guaranteed* to them. But the Eighteenth Amendment says: No mere majority, no ordinary legislative procedure, shall be competent to *restore* to the

people the liberty that is hereby *taken away* from them.

Thus the Eighteenth Amendment not only asserts the right of the majority to control the personal habits of all our people, from the Atlantic to the Pacific and from the Great Lakes to the Gulf. It does much more than that. It asserts the right of the majority *of today* to rivet that control so that it cannot be shaken off, even by a majority, *in the future*—year after year, decade after decade, generation after generation. Such an arrogation of power is a monstrosity which even those who assert the doctrine of the divine right of the majority ought to recognize as preposterous.

CHAPTER V

"THOU SHALT NOT" IN THE OLD CONSTITUTION

In the preceding chapter, I pointed out briefly what the Constitution of the United States undertook to do: "It provided a certain framework for the Federal government which it created; it fixed the limits of the power of that government, as distinguished from the State governments; and it guaranteed certain essentials of liberty and property. It said nothing whatever about cocktails; and it commanded the kind of respect which a true Constitution is capable of commanding, and which no Constitution that undertakes to deal with cocktails can possibly command."

But this does not begin to do justice to the contrast between the Eighteenth Amendment and the rest of the Constitution. The old Constitution—the Constitution as it was before the Eighteenth Amendment —not only contained no prohibition of drink; it contained no prohibition of *any* personal act, however criminal. It left the question of crime to be dealt with by ordinary legislation. It contained many

prohibitions; but in every instance its "Thou shalt not" was addressed to the *government,* State or Federal, not to the *citizen.* The object in every case was to set limits to governmental power, in no case to control individual conduct. It contained no prohibition of murder, or arson, or forgery, or perjury, or robbery; it contains no such prohibition now. The only personal act that the Constitution of the United States makes a crime today is the manufacture, sale, or importation of intoxicating liquor.

The absence of any provision designed to control personal conduct was no accident; such provision was wholly foreign to the very idea of the Constitution. In so far as it imposed restraints, the purpose of the restraints was to protect individuals or classes against governmental tyranny or injustice. The power of government to make laws against crime was ample; no Constitution was needed for that purpose. But it was by no means certain that the power of government would never be so used as to destroy or impair rights held to be essential to a free people. Accordingly, there were certain things which the Constitution prohibited government from doing. What kind of things these were may be seen from a few instances:

> Congress shall make no law respecting an establishment of religion or preventing the free exercise thereof, or abridging the freedom of speech or of the press.
>
> No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Not one of these provisions says "Thou shalt not" to the individual citizen; every one of them says "Thou shalt not" to Congress, or President, or Governor, or Legislature, or judge; every one of them is designed to protect individuals or classes against governmental oppression or injustice.

It is interesting to observe that there is one crime that the Constitution does deal with—the crime of treason; and it is still more interesting to note just how the Constitution deals with it. Treason stands apart from all other crimes in that it aims directly against the very existence of the constituted government; it might therefore be supposed that in the case

of treason the Constitution would naturally depart from its attitude in regard to crimes in general and lay down a positive law concerning it. But even in dealing with treason, the Constitution does nothing of the kind; on the contrary its provisions even on this crime are directed solely to setting limits to governmental power. The subject is dealt with in Article III, Section 3, of the Constitution, which reads (in full) as follows:

> 1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.
>
> 2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attained.

Every word of this is directed to the protection of the citizen against governmental excess. No words or writing, and no acts short of levying war, or participating in war, against the United States shall constitute treason; conviction of treason shall not be possible without the kind of testimony prescribed; punishment for treason shall not extend beyond the guilty party. That is all. Even in the case of the

crime of treason, the sole concern of the Constitution was to protect individuals against the excesses of governmental zeal or popular frenzy.

It seems needless to say anything more concerning the utter discordance of the Eighteenth Amendment with the entire spirit and purpose of the Constitution. But there is one aspect of the actual operation of the Eighteenth Amendment which brings out the contrast in a still more glaring light. The provisions of the Constitution quoted in the early portion of this chapter form part of what is generally known as the Bill of Rights. This Bill of Rights has been cherished by generation after generation of Americans as a veritable charter of liberty. It is, indeed, part of that heritage of liberty which we derive from the most precious of British traditions. To place on a level with these sacred bulwarks of human rights an arbitrary restraint upon the personal habits of daily life was bad enough, outrageous enough, in itself. The Eighteenth Amendment does this, on its face; in its actual working it does much more than this. For it has aroused such widespread resentment, it has been met with such contemptuous disregard on the part of millions of American citizens, the task of enforcement has proved to be one of such stupendous difficulty, that those charged with it are constantly

tempted to transgress, and in countless cases do transgress, the limits which the Bill of Rights imposes upon governmental power. Into this subject we shall enter more fully in a later chapter. For the present, it suffices to note that the Eighteenth Amendment not only perverts the Constitution by applying it to an end wholly foreign to its spirit and purpose, but also undermines some of its most vital provisions by the violations of the Bill of Rights which are committed in the pursuit of that end.

CHAPTER VI

CONCERNING RESPECT FOR LAW

The Prohibition law is contemptuously disregarded by millions of citizens, including multitudes of men and women of the highest standing in the community. As to this fact there is no dispute; it is asserted by Prohibitionists and anti-Prohibitionists alike.

Nor is there much difference of opinion as to the evil effect of this upon respect for law in general. Nearly everybody, on both sides, feels that the contempt with which the Prohibition law is treated by millions of reputable citizens is big with danger to the authority of law in general and to the very foundations of our democracy.

Yet there are many laws on the statute books which are far more completely ignored than the Prohibition law, and nobody thinks of their violation as a grave evil or public danger. Why is it, then, that the widespread disregard of this particular law is felt to be so serious a menace to respect for law in general? The reason is plain enough, when we come to think about it.

Sometimes a law becomes a dead letter by common consent, and then it is virtually no law at all. Such is the case with the old "blue laws" of a number of our States. Somehow or other, they can't be got off the statute books; but no attempt is made to enforce them. Once in a long while, in one county or another, there is a freakish spasm of enforcement zeal, but it always proves to be farcical and short-lived. People in general never think of these laws at all; they are as if they did not exist. Accordingly, the ignoring of them has no influence on people's habits of thought, and does no injury to their regard for the authority of law in general.

Without having actually become a dead letter, a law may be of such character that nobody expects it to be strictly observed. It may demand something that is evidently unreasonable or impracticable, and the community gets into the habit of viewing its violation, in greater or less degree, with entire complacency. The most important instance of this kind of law is that of the general property tax—a tax levied at the same rate on all forms of property. Most of our States kept this tax on their statute books for years and years after it had become evident that it was utterly unreasonable and impracticable so far as regards stocks, bonds, etc.; the consequence was that nearly everybody evaded the tax on these forms

of property. This was a regrettable state of things; it was not so entirely harmless as the ignoring of a law which has actually become a dead letter. However, the injury it did to respect for law in general was very slight; a law that is broken once a year, that is broken because its unreasonableness is almost universally admitted, and that the government makes almost no effort to enforce, does not have much relation to the status of law in general.

Utterly different from all this is the case of the Prohibition law. That law, so far from being dead, is on the face of things the livest of all laws; the endeavor to enforce it is the most conspicuous of all our governmental activities; the law is violated, not once a year by a particular class of people, but every day of the year by millions of men and women of all classes; and the desperate efforts of the government to cope with this situation are a familiar feature of every day's news. To imagine that such a state of things can go on year after year without disastrously impairing the general respect for law would be the height of folly.

To bring this state of things to an end must therefore be the desire of all good citizens, whatever view they may take of the Prohibition question in the abstract. But how can it be brought to an end? The

right way would be to repeal the law—that is the way that all nations capable of self-government do with laws that bring about such consequences as this. It is also the way that wise governments of any kind—monarchies, oligarchies, aristocracies—do in such a situation. With us, the lamentable error of having put Prohibition into the Constitution makes this extraordinarily difficult; and yet it is to this that we must look forward in the end as the only satisfactory solution.

At best, however, this will take very many years to accomplish; and in the meanwhile it is possible that the situation may be improved by the relegation of the law to something like the status of a dead letter; for, as we have seen, when everybody frankly recognizes that a certain law has become a dead letter, the situation is much the same as though it had been repealed. It does not give rise to that constant struggle between the enforcement of the law on the one hand and the wholesale violation of it on the other—without the slightest sense of guilt on the part of the violators—which makes Prohibition so profoundly demoralizing to the nation.

One way of attempting to get rid of the trouble would be to increase the rigor of the law and to employ a vastly greater number of men and a vastly

greater sum of money in its enforcement. Whether such a course, if adopted, would succeed in its object is in the highest degree doubtful; all experience points to the probability that it would only drive the violation of the law into other channels, and at the same time enormously intensify the resentment aroused by the law. But, be this as it may, the fact is that there is no chance of getting such a course adopted. In both houses of Congress, the Prohibitionists have controlled an overwhelming majority of votes throughout the seven years since the Eighteenth Amendment became part of the Constitution; yet they have never been able to make headway in this direction. Supine as Congress may have shown itself in the matter of Prohibition, it has nevertheless been clear that there was a limit beyond which it could not be driven.

Even more hopeless than this is the endeavor to bring about respect for the Prohibition law by pious or patriotic exhortation. It is for this purpose that there was organized, several years ago, a National Citizens' Committee of One Thousand for Law Enforcement. Once every year, this Committee, or a delegation from it, goes to Washington to impress its views upon the country. But no perceptible number of persons have been in the slightest degree influenced by its appeals. And in this there is nothing at

all surprising. The people who treat this particular law with contempt, because they regard it as an outrageous infringement of their personal liberty, are perfectly aware that it *is* a law, and that it could not be a law unless many millions of their fellow-citizens had felt it right that the law should be enacted. Is it not silly to imagine that the respect which these people refuse to pay to the public law they will pay to the pious appeal of a few private individuals?

To many persons, no doubt, in spite of all that has been said above, the question of the basis of respect for law must still seem very puzzling. To such persons I should like to recommend a reading of the article on "Law Making and Law Enforcement" which appeared in *Harper's Magazine* for November, 1925, and of which the author is Arthur T. Hadley, President Emeritus of Yale University, one of the foremost of American publicists. The opening paragraph of the article is as follows:

> Who enforces the laws?
>
> The first impulse of most people would be to answer, "The police and the sheriffs, with occasional assistance from the army in emergencies." But if we stop to think about the matter we shall see that this is a very superficial view of things, and that only a small fraction of our law enforcement is secured or needs to be secured in this way. In ninety-

nine cases out of a hundred obedience to the law is quite voluntary. The people at large do not have to be compelled by the police to obey the laws against murder or burglary or the various regulations for the convenience of the public. They do it of themselves, either as a matter of conscience or in deference to public opinion. And the fact that they do it of themselves is the thing which makes civilized society possible. It enables the police to concentrate their attention on the work of protecting the public against a relatively small number of habitual lawbreakers who do not recognize their moral obligations to themselves or to society. Conscience and public opinion enforce the laws; the police suppress the exceptions.

The bottom reason of the frightful mess that the Prohibition law has made is that it utterly ignores the conditions upon which rational law making and rational law enforcement depend.

CHAPTER VII

THE COST OF ENFORCEMENT

The attempt to enforce the Prohibition laws costs a good deal of money. Congress appropriates about thirty million dollars a year directly for the purpose, and a far larger expense is involved in the burden it places upon police and courts and prisons. But all this is a mere bagatelle. The cost of Prohibition enforcement in dollars and cents, though by no means trifling, is too small a matter for this great and enormously wealthy nation to be worried about.

But there is an entirely different kind of price that we are paying for Prohibition enforcement—a terrible price in the shape of bribery and corruption, a terrible price in the shape of countless crimes committed by agents of the law, a terrible price in the shape of the violation of principles long held sacred as the defense of a free people against the tyranny of arbitrary power.

It would be useless for me to try in a brief space to bring this state of things home to the reader by individual instances of malfeasance. A few instances would prove nothing; and to give a multitude of in-

stances is out of the question in a brief space. But the citation of instances is unnecessary. To any man who has kept in touch with the daily news during the past seven years, the story is only too familiar. Prohibition officers removed by the score for corruption; constant changes in enforcement methods for the sake of getting rid first of one and then of another of the abuses that have been discovered; hold-ups of innocent persons by Prohibition agents, with the killing of the innocent a not infrequent incident—these things have been familiar items of news throughout the time that national Prohibition has been on the statute books.

But as regards the state of our country, the most serious aspect of Prohibition enforcement does not lie in the corruption of individual agents or even the outrages which have been committed by them. It lies in the readiness which has been shown by so many perfectly honest and well-meaning Prohibitionists, in office and out, to brush aside the most cherished principles of our law, to sacrifice the best traditions of our government, in the pursuit of their object. If they have not got very far in breaking down these principles and traditions, it is not because of their own moderation or restraint, but because of the resistance which they have encountered. Were it not

for the barrier presented by the Constitution, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" would unquestionably by this time have been disastrously impaired in the effort to make national Prohibition effective. So would the right of trial by jury. In fact both of these rights have been seriously encroached upon. Although the Supreme Court has blocked these encroachments in some directions, it has permitted them in others. For even the Supreme Court is, and of necessity must be, influenced by considerations of practical necessity as well as of strict judicial interpretation; and it is reluctant to deny to the agencies of government the powers necessary for the enforcement of any valid law.

Now the trouble about the national Prohibition law is that it evidently cannot be enforced without stretching the powers of government to the utmost limits that the Constitution permits; and these limits cannot be precisely defined. The Supreme Court has gone as far as possible in giving governmental power the benefit of the doubt; though in the opinion of many persons of the highest competence it would have been infinitely wiser to give the principles of individual liberty the benefit of the doubt. Be this as it may, we are paying a heavy price for Pro-

hibition in the shape of impairment of the traditional safeguards of liberty. Injunctions, padlocking, confiscation, have become familiar substitutes for the orderly processes of law enforcement by trial, conviction, and sentence based upon proved guilt; and all this is but a mere fraction of what would have happened if the course of Prohibitionist tyranny had not been held in check both by a wholesome public sentiment and by the actual interposition of the courts.

Every now and then, one hears of some person of considerable prominence declaring that if the people won't obey the Prohibition law, they ought to be compelled to obey it if it took the whole power of the United States army to enforce it. Of course such extravagant nonsense is not sanctioned by any but a few extremists; it would be unfair to charge Prohibitionists in general, or even the leaders of the Anti-Saloon League, with responsibility for any such proposal. But at bottom such a proposal only carries to a preposterous extreme the error that underlies a large part of the entire campaign of Prohibition enforcement.

That error consists in the notion that if a law is deliberately resisted by a large part of the population, every possible resource of governmental power ought to be used to overcome that resistance. If you

can't get juries to convict, find some way of doing without juries; if you can't get search-warrants enough to meet the case, search without warrants; if the courts are congested, and the police overworked, create more courts and employ more police. The idea that the enormous extent and extraordinary character of the resistance means that the law is wrong does not seem to cross the minds of these well-meaning but misguided persons. Yet nothing is better established by the experience of mankind, nothing more clearly recognized by those who have given thought and study to the great principles of law and government. When a law, and especially a law designed to regulate the ordinary habits of daily life, clearly fails to command the general consent of the people, the remedy is to be sought in changing the law to fit the people, not in an obstinate endeavor to change the people to fit the law.

What we are witnessing in the matter of national Prohibition is no new phenomenon; though in degree it goes beyond all previous record, it is in kind the most familiar of juristic experiences. Let us see what was said on the subject by the late James C. Carter, one of the foremost of American lawyers, and one of the finest exemplars of American citizenship, in

his book on *Law, Its Origin, Growth and Function*, published twenty years ago:

> When a law is made declaring conduct widely practiced and widely regarded as innocent to be a crime, the evil consequences which arise upon attempts to enforce it are apt to be viewed as the consequences of the forbidden practice, and not of the attempt to suppress it; and it is believed that the true method of avoiding, or doing away with, these consequences is to press the efforts at enforcement with increased energy. But when a mistake has been made, its consequences cannot be avoided by a more vigorous persistence in it. . . .
>
> The law when enacted will not execute itself. It requires the active interposition of man to put it in force. Evidence must be found and prosecutions set in motion, and as this is a task in which good men are commonly found to be unwilling, or too indolent to voluntarily engage, others must be sought for who will undertake it. The spy and informer are hired, but their testimony is open to much impeachment, and is met by opposing testimony often false and perjured. The trials become scenes of perjury and subornation of perjury, and juries find abundant excuses for rendering verdicts of acquittal or persisting in disagreements, contrary to their oaths. The whole machinery of enforcement fails, or, if it succeeds at all, it is in particular places only, while in others the law is violated with impunity. . . .

> An especially pernicious effect is that society becomes divided between the friends and the foes of the repressive law, and the opposing parties become animated with a hostility which prevents united action for purposes considered beneficial by both. Perhaps the worst of all is that the general regard and reverence for law are impaired, a consequence the mischief of which can scarcely be estimated.

This was written many years before Prohibition became a national issue; has not every word of it been fulfilled in our actual experience under the Eighteenth Amendment?

CHAPTER VIII

CONCERNING DESPERATE REMEDIES

In the face of all the objections we have been considering, our Prohibition law might conceivably be defended on the ground of imperious necessity. It might be admitted that the law is an extraordinary invasion of personal liberty; that it is a perversion of the Constitution; that it breaks down the spirit of our Federal Union; that it leads to an unparalleled disregard for law among reputable and respected citizens; that it creates a vast and lucrative criminal business in the shape of bootlegging; that it tends to obliterate the most precious traditions of our civic law;—all this the Prohibitionist might admit, and yet defend the law upon the principle that a desperate situation justifies a desperate remedy.

But in order to justify resort to a desperate remedy, it is necessary, first, that the situation be really a desperate one, and secondly that no other means of dealing with it be possible. In the case of our Prohibition law, neither of these things is true; indeed, both of them are the opposite of the truth.

For many decades the evils of drink had been steadily diminishing. Habits of excess which were common in times that many men can distinctly remember, had become rare and exceptional; habitual drunkenness, formerly regarded with a certain kindly tolerance, had come to be looked upon as an inexcusable vice. Even in the last two or three decades, the change had been steadily progressing—the change from immoderate indulgence to temperate enjoyment, the change often from drinking at all to total abstinence, the change from the time when drunken men were a familiar sight to the time when they had become an unusual spectacle.

All this was going on not only in our country but throughout Europe; and in addition to all this, there was, in our country, according to the Prohibitionists themselves, so rapid a spread of State or local Prohibition that almost the whole country had been covered by it. So far from the situation being desperate, the situation was in the highest degree hopeful. It did not, indeed, promise a speedy fulfillment of all that the Prohibitionists desired; a good deal of time and of patient endeavor was still needed for the attainment of their object; and even in the end the purpose they had at heart might not be completely accomplished. But the evils they were fighting were steadily diminishing, and the worst of them

were fairly headed for something like extinction; there was nothing in the situation to call for resort to a violent departure from the tested principles of rational lawmaking.

So much for the character of the situation; and the case is even clearer as to the possible ways of dealing with it. Compulsory total abstinence, imposed by a virtually unrepealable law imbedded in the Constitution, is the most extreme method conceivable for coping with the problem of drink. This extreme was resorted to, not because there was no other way, but because it presented the allurement of a short-cut—a means of accomplishing the result by a single stroke, of putting an end forever to all difficulties and all opposition. The allurement has proved deceptive; the result, if accomplished at all, will not be accomplished for many, many years; difficulties of the most formidable kind have arisen; and opposition has been incomparably more intense and more widespread than any that had been encountered by more moderate measures.

Of these more moderate measures there have been many, in our own country and in Europe, that have produced beneficial results and have been attended by no such evils as those brought on by the Eighteenth Amendment. Even if it be granted that a re-

sort to Federal legislation was desirable, it would still have been possible to give to that legislation a reasonable character. Instead of making a law which we were free to amend like other laws in case it was found unsatisfactory, the Prohibition law was put into the Constitution, so that the only practical form that opposition could take was defiance, since orderly amendment or repeal was out of the question. And instead of making a law which embodied the results of experience, we took a leap in the dark; for not only had no great nation ever been placed under a bone-dry Prohibition law, but even in our own country no great city, and no State containing a great city, had ever adopted such a law.

If there was to be a Constitutional Amendment relating to drink, it ought of course to have been one giving Congress power to legislate on the subject. This would have been contrary to the spirit of our Federal Union, under which each State has the power to deal as it thinks fit with all the ordinary concerns of its citizens; but at least it would have left to the representatives of the American people as a whole the right to make such laws on the subject as they deemed proper, and to amend or repeal them when they wished to do so or when public sentiment demanded a change. In that case Congress might or might not have passed an act of bone-dry national

Prohibition; but if it had done so we should not have been bound hand and foot as we now are. When we found that the law was not producing the expected good results, or that it was producing grave evils on an enormous scale, we should have been free to try what Quebec and other Canadian Provinces have tried, what Sweden or Norway has tried, what England has tried, or some form of the local-option idea which has been so extensively applied in many States of our own country. If no other method were known, there might be some excuse for resorting to the desperate remedy of a Constitutional strait-jacket to be worn permanently, no matter how frightful the consequences. But everybody knows that there are plenty of other methods, some of them recommended by years of successful experience, all of them far more reasonable in their nature, and none of them attended by any such fearful injury to our public life, our civic traditions, and our heritage of freedom.

CHAPTER IX

PERSONAL LIBERTY

When we object to Prohibition as an invasion of personal liberty, the Prohibitionist answers that all government involves a surrender of personal liberty.

This is perfectly true, but it is no answer to the objection. Government does indeed involve some surrender of personal liberty, but it does not involve a complete surrender of personal liberty; and the trouble with the Prohibitionist's answer is that he cannot point out any other surrender of personal liberty that is at all comparable to that imposed by the Eighteenth Amendment.

Among any free people the surrender of personal liberty is demanded, generally speaking, only to the extent to which the right of one individual to do as he pleases has to be restricted either to prevent violation of the elementary rights of other individuals, or to preserve conditions essential to the general safety or welfare.

Stealing, murder, arson come under the first head; instances of the second are driving on the wrong side of the street, disturbing the public by loud noises,

etc. If A steals, he steals from B; if he murders, he kills B; if he commits arson, he sets fire to B's house or defrauds the insurance company. If a man drives on the wrong side of the street, he obstructs and endangers public traffic; if he makes a loud noise in the street, he disturbs the comfort of hundreds of his fellow citizens.

Between restraints directed against acts like these, and restraints intended to compel people to conform in their personal habits to standards imposed by governmental authority, there is a difference so tremendous that one must be blind not to see it. And there is an equally great contrast as regards the way in which the restraint is felt. A surrender of personal liberty which is made by practically unanimous consent is a wholly different thing from a surrender which is forced by the law in the face of the determined protest of vast multitudes of perfectly normal men and women. Is there a single human being who desires to have the liberty to drive on the wrong side of the street, or who feels the prohibition to do so as a personal grievance? Where are the people who wish to repeal the laws against forgery, or arson, or obtaining money under false pretenses?

Even if there were no other difference between Prohibition and other restrictive laws and regula-

tions, there would still be the capital difference that millions of persons openly object to it as a restraint upon their personal liberty and as an impairment of their comfort and happiness. If there is any other law of which this can be said, it is curious that the Prohibitionists never point it out. They are in the absurd position of asking us to accept without protest a law to which millions of persons object as a gross violation of their liberty, simply because we accept without protest laws to which nobody objects at all.

There is, it must be confessed, one instance of restraint upon personal liberty which the Prohibitionist can cite with considerable plausibility. That instance is the law against narcotic drugs. We are bound to admit that here is a restraint upon a man's personal habits which is of the same nature as a law prohibiting alcoholic drinks. How then can we consistently, while justifying the one, denounce the other as a violation of the principle of personal liberty? The two things would, indeed, be inconsistent, if the principle of personal liberty were asserted as something absolutely sacred, something from which no departure, however slight, can be permitted for any purpose however important. But there is no principle of human conduct which can be applied with undeviating rigor to all possible

cases; the principle of personal liberty, like every other principle of mankind, must yield in extreme cases—cases where the sacrifice is very slight and the good to be attained very great. We all believe in the principle that lying is wrong; yet we all believe that there are times when it is right to lie. It is a supreme principle of the medical profession that the life of a patient must be preserved as long as possible; yet every sensible physician mercifully refrains from prolonging life to the bitter end by every possible resource in a case of extreme and hopeless agony. Deviating from a principle in such extreme cases leaves the principle itself uninjured.

So it is in the case of the narcotic-drug law. The use of narcotic drugs (except as medicine) is so unmitigatedly harmful that there is hardly a human being who contends that it is otherwise. People crave it, but they are ashamed of the craving. It plays no part in any acknowledged form of human intercourse; it is connected with no joys or benefits that normal human beings openly prize; it stands outside of the category alike of the ordinary objects of human desire and the ordinary causes of human degradation. To make an exception to the principle of liberty in such a case is to do just what common sense dictates in scores of instances where the strict application of a general principle to extreme cases

would involve an intolerable sacrifice. To make the prohibition of narcotic drugs a reason for approving the prohibition of alcoholic drinks would be like calling upon physicians to throw into the scrap heap their principle of the sanctity of human life because they do not apply that principle with literal rigor in cases where to do so would be an act of inhuman and unmitigated cruelty.

CHAPTER X

THE CRIME OF DRINKING

The Eighteenth Amendment does not expressly make drinking a crime. It prohibits the manufacture, sale, or transportation of intoxicating liquors, not the drinking of them.

But the prohibition of the drinking is of course its real purpose and effect. Making or selling is forbidden solely because it makes drinking possible. The crime against which the Eighteenth Amendment is directed is the crime of drinking.

Yet if the Eighteenth Amendment had said in words what it says in effect, it would not have had a ghost of a chance of adoption. Just insert the two words "or drinking" in the Eighteenth Amendment, so as to make it read "the manufacture, sale, transportation, *or drinking* of intoxicating liquors . . . is hereby prohibited," and you have a proposal so plainly offensive to the instinct of liberty that it would have aroused immediate and effective opposition.

The widespread contempt and disregard with

which multitudes of our best citizens treat the Eighteenth Amendment is closely related to the circumstance just noted. The act against which the law is really directed is so far from being in itself criminal, or even reprehensible, that the makers of the law never thought of going so far as to prohibit it directly. If such a notion had ever been entertained by them, it would have been dismissed at once, as fatal to any possibility of getting the law accepted, so long as the instinct of liberty retained any hold at all on the American people. And it is instructive to consider how the Prohibition law compares in this respect with other laws dealing with crime.

Take the crime of forgery, for example, or the crime of arson. We are constantly told, in the most solemn way, that the Prohibition law, so long as it *is* a law, is entitled to just as much respect as the law against forgery or the law against arson. There are many reasons why this is not so; but the chief difference is that arson and forgery are regarded as crimes by everybody, and the law only puts into definite form, and supports by governmental power, what everybody regards as right in itself, and as clearly necessary to the general security and welfare. And in addition to this fundamental difference, there is the difference which we have just been noting in the nature of the law itself.

What does the law do to prevent the crime of forgery, and to punish it when committed? Does it prohibit "the manufacture, sale, or transportation of pens and ink for forgery purposes," as the Eighteenth Amendment prohibits "the manufacture, sale or transportation of intoxicating liquors for beverage purposes"? Not at all. Anybody who wishes to commit a forgery can get all the pens and ink he wants without the slightest difficulty; the law prohibits the crime itself, not the means whereby the crime may be committed. Very few people ever think of becoming forgers though everybody has pens and ink, and very few people ever think of committing arson though everybody has plenty of matches. Forgery and arson and stealing are real crimes; everybody regards them as crimes, and the law is not afraid to call them crimes. Millions of people do not regard drinking as a crime, but on the contrary regard it as a desirable element in life, unless carried to excess. Accordingly, while all that has to be done about forgery and arson and stealing is to keep in check a small number of people of exceptionally criminal propensities, the Prohibition law requires the constant efforts of enforcement agents to counteract the desires of millions of perfectly normal persons, who either violate the law themselves or aid and abet those who violate it.

It is easy to imagine what would happen if the crime of drinking were treated by the law just as the crime of arson or forgery is treated—in other words if the manufacture and sale of intoxicating liquors were freely permitted (just as that of pens and ink and matches is freely permitted) and only the drinking of them were made a crime. How many people would pay any attention to that law? Of course *enforcement* would be practically out of the question; I am not thinking of that. I am thinking of voluntary observance of the law—refraining from drink as we refrain from forgery or arson. Would anybody?

But, it may be asked, why bring up a fantastic supposition like that? Why inquire what would happen if the law were such as nobody would ever think of proposing? I admit that the law would be absurd, and that nobody would be so silly as to propose it; but the consideration of how this imaginary law would be treated serves to emphasize the true nature of the way in which our actual law is treated. For it shows that, extensive as is the violation of the law, widespread as is the disregard of it, such observance as it does command is not really due to respect for the law, but is almost entirely due to the difficulty of obtaining the means of violating it.

Is there any other law of which anything like the

same thing can be said? Any other law that rests for its observance almost solely on the physical difficulties that have to be overcome in order to break it? Is not the drinking of intoxicating liquors the only act that the government is using every effort to stamp out as criminal and yet that millions of persons of good standing in the community commit every day without the slightest sense of moral turpitude? Is there any other criminal law in active operation which does not rest for its effectiveness upon the moral support of practically the whole community? To depend on this moral support is in the nature of law; to depend on cutting off the enemy's supply is in the nature of war.

And that is what our national Prohibition really is. In the case of other laws, we have the whole people arrayed against a few criminals; in the attempt to make drinking a crime, we have a war of one half of the people against the other half.

CHAPTER XI

A HOUSE DIVIDED AGAINST ITSELF

Will it ever be possible to repeal the Eighteenth Amendment? Nobody knows. It will of course be a tremendous job. Many persons ardently opposed to Prohibition regard repeal as impossible; others see in the remarkable increase of opposition to the Amendment the promise of ultimate repeal. Certainly the opposition has been growing more widespread and more outspoken year by year.

But whatever anybody else may think, there is no question at all as to what the Prohibitionists themselves think about it. Whenever any one speaks of even modifying the Volstead Act so as to permit beer and light wines, the Prohibitionists declare that this would be a violation of the Eighteenth Amendment, and that the Eighteenth Amendment can never be repealed.

And why can it never be repealed? They have no hesitation whatever in telling us why. It can never be repealed, because the South and West will stand by it no matter how much it may be resented in the

North and East; because the people in country districts will insist upon it no matter how oppressive it may be regarded by the people of the cities; because certain religious denominations will hold it sacred no matter how much lawlessness and corruption may be generated by the attempt to enforce it.

Let us try to realize what this means. It means that States like New York and Pennsylvania and Maryland and Illinois are told that no matter how strongly a majority of their people may wish to throw off the shackles of this law, no matter how persistently they may endeavor to do so, year after year, decade after decade, generation after generation, they must submit to its iron-clad requirements, because far-away States like Kansas and Idaho and Alabama, whose conditions are wholly different, so decree. It means that the inhabitants of cities like New York and Boston and Chicago and St. Louis must conform their daily lives to a rule imposed upon them and their children and their children's children by the will of farmers and villagers wholly unacquainted with the needs and preferences of the people of great cities. It means that a law whose pressure is felt every day by millions of persons as a restraint upon their liberty in a purely personal matter, shall be maintained without such hope of

relief as is always held out to the discontented in the case of any ordinary law. It means that, with the hope of relief thus cut off, multitudes of citizens who would otherwise have had as much respect for law as anybody look with indulgence, and often with actual sympathy and encouragement, on the numberless illicit ways in which the law is thwarted. It means that no matter how grave may be the evils which accompany this lawlessness, it is idle to attempt to remove these evils by removing their cause.

The cleavage that is thus created in the nation's citizenry is of a nature very different from that which arises out of a mere difference of opinion on public questions. The man that resents Prohibition feels Prohibition every day as an act of coercion; whether he is prevented from getting his drink or whether he resorts to illicit means to get it, in either case he finds the law galling. On the other hand the convinced Prohibitionist looks upon the man who breaks the law, or who desires to have it broken, not merely as a man who differs from him in opinion, but as a bad citizen, a person who places gratification of his desires above his duty to his country. Imagine this situation applying not to a few thousand people, or a few hundreds of thousands of people, but to millions of people on both sides of the case, and you cannot fail to perceive that it has introduced in our

civic life a division of feeling charged with an enormous potency of evil.

No division comparable to this has been known in our country since the slavery question was settled. We have had political battles over the tariff, the currency, League of Nations, etc. But, however high feeling may have run in these matters, they were issues which everybody looked forward to seeing disposed of in the normal course of things. Moreover, they did not enter into the very fabric of daily life as does the Prohibition issue; people were stirred up about them when elections were coming on, and then dismissed them from their minds until the next campaign.

This was not so with the slavery question; it is not so with the Prohibition question. In the case of slavery, there gradually arose so intense a feeling between North and South that it finally became evident that it had to be settled if the country was to survive. The North was finding it more and more intolerable that human beings should, in any part of the country, be owned as chattels by other human beings; the South was finding it more and more intolerable that an institution which it regarded as essential to the well-being of the Southern States should be threatened with extinction by the Northern States. It came to be more and more widely felt that this state of things could not continue permanently

without destroying the Union; that, as Lincoln put it in a memorable speech, "A house divided against itself cannot stand."

This division of feeling, which threatened the very life of the nation, and which culminated in a gigantic Civil War, was the result of deep-seated historic causes, in the face of which the wisdom and patriotism of three generations of Americans found itself powerless. I do not say that the division which Prohibition has created threatens the very life of the nation, as did the slavery issue; but no one who seriously considers the situation can fail to see that it impairs in the most serious way the spirit upon which our civic harmony, our whole-hearted devotion to the institutions of our country, depends. And whereas the division created by slavery was the result of deep-seated historic causes, the division created by Prohibition was brought about by a single act and can be removed by the undoing of that act.

Up to the time when the Eighteenth Amendment was put into the Constitution, there had not been a trace of this bitterness and dissension on the subject of Prohibition, although Prohibition had been a live issue in the various States for more than half a century. The Eighteenth Amendment is the one thing that created the trouble; the repeal of the Eighteenth Amendment is the one thing that can remove it.

CHAPTER XII

DRINK AND CRIME

The Eighteenth Amendment was put through with a rush. Only a very few years intervened between the time it was first seriously proposed in Congress and the time it was ratified by the Legislatures of three-fourths of the States. But the Prohibition agitation had been going on, in one form or another, throughout the country for three-quarters of a century. And during all that time perhaps no Prohibitionist assertion was more familiar than the assertion that drink was the chief cause of crime.

Comparatively little is heard of that assertion nowadays. Of course it is still made by fanatics and by professional propagandists, but it is no longer at all common. In former times many entirely reasonable persons, hearing this statement so constantly made, accepted it as true, without inquiry as to its basis. Nowadays it is rarely heard, and still more rarely believed.

The reason for this change is obvious. We have now been living seven years under a nation-wide bone-dry law and nothing much has happened in

the way of the disappearance of crime. Some statisticians say it has diminished, some say it has increased, and some say it is much the same as ever.

There has been a great deal of talk about a "crime wave"; and this has not come from Prohibitionists or from anti-Prohibitionists, but has evidently been a spontaneous expression of a deep-seated and almost nation-wide feeling based upon the everyday news. Never, I feel sure, in the history of the country has there been so grave a feeling of anxiety over the supposed increase of crime. I doubt whether there has been any real foundation for this anxiety. But so serious and so general has the feeling been that it led to the formation about two years ago of a National Crime Commission; and it is interesting to note that among the leading figures in the movement for this Commission was Mr. Elbert H. Gary, President of the Steel Trust and one of the most prominent champions of Prohibition.

But if there has not been a great and unmistakable change in regard to crime, Prohibitionists are faced with a frightful dilemma. Either drink is not the chief cause of crime, or Prohibition has not done much to drink. No wonder, then, that we hear comparatively little now of the dogma about the relation of drink to crime which was so constantly asserted in former

times, and which was one of the chief supports of the whole Prohibition movement. Prohibitionists cannot afford to admit that the attempt to enforce the Eighteenth Amendment has been a dismal failure; neither can they afford to admit that it has been successfully enforced and yet has accomplished no great things in the way of the abolition of crime.

The truth is that the assertion that crime is caused chiefly by drink never rested upon any respectable foundation in known facts. Of course, there have always been many instances—enough to be matter of very serious concern—of crime that had their origin in drink. But the percentage of such cases, as determined or estimated by capable authorities, has never constituted a very large proportion of the whole. The assertion that it is the chief cause of crime had its source not in any competent or judicial examination of facts, but in the enthusiastic zeal of one-ideaed reformers.

In the face of everything, however, some leading exponents of Prohibition talk just as though nothing had happened to their favorite notion. The most conspicuous of all these exponents is, of course, Mr. Wayne B. Wheeler, General Counsel of the Anti-Saloon League. In *Current History* for August, 1925, Mr. Wheeler presented an elaborate review of the

workings of national Prohibition during its first five years. What he said about crime and other social evils was summed up in this sentence:

> So long as the use of intoxicants was general, crime, pauperism, insanity, disease and death were inevitably increasing. With Prohibition they have decreased.

The facts about "pauperism, insanity, disease and death" will be touched on in a later chapter. Here we are concerned with Mr. Wheeler's assertion about crime. It is almost inconceivable that, in the face of facts known to all intelligent persons at the time Mr. Wheeler was writing, any one could have had the audacity to say that in the absence of Prohibition crime must be "inevitably increasing," while with Prohibition it has decreased.

The ink was hardly dry on Mr. Wheeler's article when two contrasting items of news happened to present themselves very conspicuously in the newspapers which are sufficient of themselves to make his assertion ludicrous. In England, Sir William Joynson Hicks, Home Secretary, told the International Prison Congress of the enormous reduction that has taken place in the number of prisoners in that country; in our own country the long-standing feeling that crime was assuming more and more formidable

dimensions came to a head in the organization of a national Crime Commission.

The British newspapers, while recognizing that the amazing reduction in the number of prisoners was due in part to improved methods of prison policy and administration, were heartily congratulating their country on the fact that there had been a most remarkable decrease in the actual number of crimes committed; the American newspapers, on the other hand, welcomed our proposed Crime Commission as a possible means of coping with a situation which imperatively demanded extraordinary attention. The feeling was well-nigh universal that we were in the midst of a crime situation of exceptional gravity; and, though criminal statistics in this country are so imperfect that it is impossible to determine the degree in which that feeling was justified, yet it surely could not represent the very opposite of the truth. But this is what we should have to believe if we were to accept Mr. Wheeler's statement that crime "has decreased since Prohibition." As for the other half of his statement—the assertion that in the absence of Prohibition crime must be "inevitably increasing"—the English statistics, which, for many decades, have been accurate, complete and trustworthy, prove this to be absolutely false. Whether America, with Prohibition, has reduced crime is at

least doubtful, and the reduction, if any, has not been sufficient to be unmistakable and impressive. England, on the other hand, without Prohibition, presents a record of improvement so great as to be the subject of profound and universal satisfaction, so unmistakable as to be beyond the possibility of dispute.

CHAPTER XIII

MANIFEST DESTINY

When a movement gets a certain headway, nothing helps it more than the spread of the belief that it is bound to succeed. Every politician knows how many people are eager to "get on the band wagon"; but that is not all. A far greater number of people, who care nothing about getting on the band wagon, are disposed to let things slide when it looks as if opposition were hopeless.

The idea of "manifest destiny" has played a large part in our political life ever since the phrase first came into vogue some eighty or ninety years ago. At that time it had reference to our policy in regard to Mexico, Cuba, and Central American countries generally. It was our "manifest destiny" to annex these regions; and what was the use of trying to thwart manifest destiny? Of course, the idea is not peculiar to this country. Thus it was for a long time the general belief, on both sides of the Atlantic, that it was the manifest destiny of China to be parceled out among the Great Powers of Europe. Well, Mexico

and Cuba have not been annexed to the United States, and today there is infinitely less talk of annexing them than there was eighty years ago; and though nobody knows what the future of China may be, the one thing certain is that she is not going to be gobbled up by the European Powers.

But what, it may be asked, has all this to do with Prohibition? Just this. When the Southern States and a number of the Western States had adopted Prohibition, multitudes of people rushed to the conclusion that the whole country was bent upon it, that to resist the tide was as futile as to try to sweep back the Atlantic Ocean with a broom. They did not stop to reflect that the South's chief motive in taking up Prohibition was to keep liquor away from the negroes; they did not stop to consider that the States of the West which had been swept by a wave of Prohibitionist enthusiasm were States of comparatively little urban population; they did not consider—in fact few people knew—that in the long story of Prohibition in this country there were many instances of States which had adopted Prohibition and afterwards given it up, and that the same thing might happen again. Indeed, the feeling was general, even among persons who were opposed to Prohibition, that it had long been gaining ground

everywhere, and that the conquest not only of the United States but of the whole world was a predestined certainty. No State or country, we were told, that had adopted Prohibition had ever relinquished it, and with the example of the United States before it the whole world would be swept into the Prohibition fold. It was a clear case of "manifest destiny."

Many causes contributed to bring about the amazingly swift and easy victory of the movement for the Eighteenth Amendment; but one of the most powerful of these causes was just this feeling that to fight against it was to try to stem an irresistible current. "What's the use," people said, "of merely putting off what is sure to come in a few years if it does not come now? Let us stop kicking against the pricks; let us make the whole nation dry at a single stroke, and have done with all the bickering, the pulling and hauling, that has been going on in our country over the question for half a century and more. There will, of course, be a certain amount of growling, and perhaps resistance, for a while; but we shall all get accustomed to the idea pretty soon, and then we shall have peace. Nation after nation will fall in line, and no nation will give up Prohibition when it has once adopted it. Many of us may not like it, but when it is once an accomplished fact all

but a few incorrigible kickers will gracefully accept the inevitable."

That this state of mind accounts, in large measure, for the failure of the opposition to make a more substantial showing before the Eighteenth Amendment was adopted, must, I think, be clear to any thoughtful observer of events. Only after the mischief had been done did it gradually become apparent that the people who objected to Prohibition formed a very large proportion—whether a majority or not I do not undertake to say—of our entire population. Those who were for it had been zealous and vocal; those who were against it had for the most part been silent; and a vast number who were not exactly for it and not exactly against it had gone with the tide or what seemed to be the tide.

But as soon as the thing had become a fact, and people waked up to the reality of it, what had seemed to be a feeble murmur of objection swelled into a loud roar of protest—a protest which, instead of gradually subsiding, keeps growing in volume and intensity year after year. Soon after the Eighteenth Amendment was adopted, Ex-President Taft (then in private life), although he had been opposed to the Amendment, stated that probably nine-tenths of the American people approved it; if he had waited

a year or two, he could not possibly have said anything of the kind. And by this time it has become evident that the notion that national Prohibition represented the deep-seated desire of the great majority (to say nothing of nine-tenths) of the American people was a sheer delusion.

As for the irresistible sweep of the Prohibition wave over the world, and as for the belief that any country that had once adopted it would never give it up—these things have fared even worse than the notion that the sentiment of the people of the United States was overwhelmingly favorable to Prohibition. Canada tried Prohibition for several years, and Province after Province has abandoned it, until now the only dry Provinces left are Nova Scotia with a population of 524,000 and Prince Edward's Island with a population of 89,000 out of a total population of 8,788,000. Norway has decisively repudiated Prohibition after many years' experience of it. Russia's case is peculiar, of course, in view of the anomalous conditions connected with the Bolshevist revolution; still, so far as it goes, it adds the case of that vast country to the list of those that have abandoned Prohibition after giving it a trial.

To say what would have been if things had been other than they actually were is always, of course

more or less hazardous; but I do not think there is much hazard of error in saying that if, by some miracle, the country could have foreseen the actual course of events, so utterly different from what had been imagined, the Eighteenth Amendment could never have been passed. Imagine the people knowing beforehand what would be the state of things seven years after the Amendment went into operation: that opposition to it in our own country would be more extensive and more intense than ever, so extensive and so intense as to make Prohibition the livest and most perplexing of all national issues; that instead of making irresistible progress throughout the world, it would be abandoned by one after another of the Provinces of Canada, and by European nations that had adopted it before we did; that it would be decisively rejected by popular vote in a country so similar to our own in its ideals as New Zealand; that not a single country would have followed our example or presented any prospect of doing so in any assignable future:—if the people could have foreseen all this, the whole temper of the situation would have been radically changed. The notion of "manifest destiny" would have been cast into the discard altogether. Multitudes of well-meaning people who gave their assent to Prohibition, not because they liked it but because they felt that it

was a foregone conclusion and the best thing to do was to accept the inevitable and have no further trouble, would have seen that there was no such excuse for taking the great plunge.

Never was there a clearer case of marrying in haste and repenting at leisure than when we, the people of the United States, entered into the bonds that tie us to the Eighteenth Amendment; and, just as in the case of other unfortunate marriages, it never would have happened if we had known what the future would bring forth.

CHAPTER XIV

STATISTICS

The object of this little book, as its title implies, is to set forth, in as clear and simple language as possible, the vital aspects of the Prohibition issue. It deals with fundamental principles and with the great outstanding facts of the existing situation; with the endless complexities and uncertainties of statistics it cannot undertake to grapple. Even in the matter of statistics, however, there are some considerations which may be profitably presented in a brief space, and which may serve in some degree to throw light upon our subject.

When statistics are appealed to by the opposing sides in any great issue, there are two separate and distinct reasons for the skepticism with which the statistical argument is usually received. There is the doubt as to the soundness of the figures themselves, and there is the doubt as to the soundness of the interpretation of the figures. In the case of Prohibition both of these troubles exist in an extraordinary degree.

Even in regard to the simple question whether

Prohibition has increased or decreased drunkenness, a fierce dispute rages; nor is it necessary to charge either side with dishonesty or want of intelligence in order to account for the dispute. And if there is room for honest dispute in a matter so simple, and so plainly related to Prohibition, there is vastly more room for dispute in regard to matters that are far more complex, and whose relation to Prohibition is far less definite. Some of these honestly disputable questions of statistics will be briefly considered further on. Just now I wish to direct attention to a very different kind of thing: baseless claims of results accomplished by Prohibition, claims that are made without hesitation or scruple but which will not stand a moment's honest and intelligent examination.

Such claims are freely indulged in by many Prohibitionist leaders and exhorters; but the most shining example is Wayne B. Wheeler himself, the head and front of the Prohibition army. One instance of this, a claim relating to the reduction of crime, I have already commented on, in the chapter on "Drink and Crime." That instance was taken from Mr. Wheeler's article on the results of Prohibition in *Current History* for August 1925; and plenty of other instances of the same thing are to be found in the article. Let us look at one or two of them.

Mr. Wheeler says:

> So long as the use of intoxicants was general, crime, pauperism, insanity, disease and death were inevitably increasing. With prohibition, they have decreased.

Of the statement about crime, I will say nothing more; that was sufficiently dealt with in a former chapter. But how about disease and death? It is difficult to imagine the state of mind—or the state of conscience—of a person who can deliberately set down in print anything so utterly and notoriously false as the statement that "so long as the use of intoxicants was general, disease and death were inevitably increasing." The death rate throughout the civilized world has been showing a steady and remarkable decrease for a generation and more; the fact is so well known that probably few persons can remember the time when it was not familiar to them. The decrease has gone on in European countries that have no trace of Prohibition; it went on in the United States before we had national Prohibition, and in wet States as well as dry. If Wayne Wheeler does not know this, he is a prodigy of ignorance; if he does know it—well, that's another thing.

I am reluctant to devote any more space to this matter. But here is a case where statistics really are pertinent and conclusive; and some readers may suspect that there is, perhaps after all, something

in the figures that may serve as an excuse for Wayne Wheeler's assertion. Well, there isn't.

Let us look at the figures as given in the latest volume of *Mortality Statistics* issued by the United States Census Bureau at the time when Mr. Wheeler's article was published. On page 19 of that volume there is a table of death rates for various countries; and the figures there given for the "registration area" of the United States, for the United Kingdom of Great Britain and Ireland, and for the Australian Commonwealth are as follows:

	1901-5	1906-10	1911-15	1920	1921	1922
U. S.	16.2	15.1	13.9	13.1	11.6	11.8
U. K.	16.3	15.1	14.7	12.8	12.5	....
Aus.	11.7	10.7	10.7	10.5	9.9	9.2

(The 1922 figures for the United Kingdom are missing.)

Between the United States figures and the United Kingdom figures there is an almost exact correspondence; and in both countries a marked decline of the death-rate showed itself throughout the period covered by the statistics. The figures for Australia are, in a way, even more interesting; for we see that there—without Prohibition—the death-rate, although it was far below that of the United States to start with, was reduced in the same proportion as that of the United States registration area; the United States rate from 16.2 to 11.8, a decline of 3.4 or 21 per cent; the Australian rate from

11.7 to 9.2, a decline of 2.5, which is also 21 per cent.

Let me add one final bit of information on the subject. The Census Bureau gives no figures for the United States registration area prior to 1901-5, but in the case of the other two countries it extends back to 1881-5. In the 20-year interval between these dates, the United Kingdom death-rate fell from 19.2 to 16.3, a reduction of 2.9, or 15 per cent; the Australian death-rate from 15.7 to 11.7, a reduction of 4.0 or more than 25 per cent. Truly a singular thing to happen in countries where "disease and death were inevitably increasing"!

Mr. Wheeler's article is honeycombed with assertions that can no more stand examination than these two upon which I have commented; but I must content myself with pointing out just one more. He says:

> Pauperism is a by-product of the drinking habit. Charity societies expended over $100,000,000 yearly in taking care of the victims of the saloon, their wives and families. Under prohibition these cases have decreased 74 per cent, for the nation at large, while in many cities they have fallen to 5 or less for every 100 formerly handled.

Now anybody who knows anything about the work of the charity societies knows that the cases in which

"pauperism is a by-product of the drink-habit" form only a moderate percentage of the whole number of cases; and likewise knows that the total expenditure for relief by the charitable societies of the country, for cases of all kinds, has never amounted to anything like $100,000,000.

Let us take up, first, the question of the total expenditure for relief. Nobody knows what that total is, but it is safe to say that it has never reached so high a figure as $20,000,000. The amounts expended in 1924 by the five great charity organizations of New York City—the A. I. C. P., the C. O. S., the United Hebrew Charities, the Catholic Charities and Society of St. Vincent de Paul, the Brooklyn Bureau of Charities, were respectively as follows:

$319,000 $159,000 $474,000 $321,000 $55,000

making a total of $1,329,000. As the population of New York is about one-tenth of the entire urban population of the country, as the work of the charity societies is practically confined to the urban population, and as the scale of expenditure in New York is presumably higher than the average, it is reasonable to suppose that the total expenditure for relief by such societies throughout the country was not much more—indeed probably much less—than ten times the expenditure in New York; but for good measure

let us call it fifteen times, and we still get less than $20,000,000. Moreover, the relief expenditure of such societies in 1924 was far greater (in dollars) than in pre-Prohibition years. Thus the figures in New York for the A. I. C. P. in the years 1910, 1915, 1918, 1924 respectively, were $83,000, $254,000, $242,000, $319,000; for the C. O. S. they were $79,000, $120,000, $120,000, $159,000; for the United Hebrew Charities they were $259,000, $245,000, $278,000, $475,000. Yet Mr. Wheeler has the effrontery to say that "pauperism is a by-product of the drink habit" and that "under Prohibition these cases have decreased 74 per cent."

Now as to the proportion of the relief funds which went to "victims of the saloon, their wives and families." The only figures that I have bearing on this question are a set of figures sent out by the Federal Prohibition Director some time ago in response to an inquiry on the subject. These concern four important cities only; but the cities were selected not by the inquirer but by the Federal Prohibition Director. These figures relate to the families receiving aid in 1916-17 from a leading charity society in Boston, Rochester, Chicago and New York; and they give the percentage of these families in which "drink was a factor" as 26 per cent, 13.4 per cent, 8.3 per cent, 19.2 per cent, in the four cities respectively. This

indicates that in the country at large the percentage of charity-aided families in which "drink was a factor" was less than 20 per cent; but if we grant that it was 20 per cent, and also use the exceedingly liberal estimate of $20,000,000 for the total expenditure, we get $4,000,000 as the utmost possible figure —instead of the $100,000,000 which Mr. Wayne Wheeler tells us was expended by the charity societies upon "the victims of the saloon, their wives and families."

I might go on with other examples of Mr. Wayne Wheeler's quality; but really these are sufficient.

CHAPTER XV

SOMETHING MORE ABOUT STATISTICS

Turning now from claims made for Prohibition with reckless disregard of facts, claims that are seen to be preposterous as soon as they are examined at all, we enter upon questions full of complexity and doubt, and encounter endless and almost fruitless disputation. As was remarked in the preceding chapter, even upon the simplest of all these questions, the question whether Prohibition has caused an increase or a decrease of drunkenness, a fierce dispute rages. Official figures of the total number of arrests for drunkenness in practically all the important cities of the United States show that during the period of war-time restriction and during the first year or two of the Volstead act, the total of these arrests was reduced to a point far below the pre-war level; and that from that time on there has been a steady increase in these arrests, until now they are pretty nearly where they were before. This looks like an exceedingly bad showing for the efficacy of national Prohibition in curbing drunkenness; but the Prohibition champions put forward the not unreason-

able claim that the police are more strict now in making arrests for drunkenness than they were before, and that if we make allowance for this factor, we conclude that there has been a great decrease in drunkenness. I say the claim is not unreasonable; but I am far from certain that it is sound; and if it is sound, it is improbable that it amounts to anything like as much as the Prohibitionists make out. Upon an exceedingly doubtful basis of inquiry, they lay down the rule that under Prohibition nine out of every ten drunken men are arrested, whereas before Prohibition only four out of every ten were arrested; and by this simple device they count every nine arrests made nowadays as only four arrests.

Now, I don't blame them for this; it is guesswork, to be sure, but is not altogether unreasonable guesswork. What I *do* blame them for is their representing the failure of the anti-Prohibitionists to allow for this factor as a fatal defect, a proof that the anti-Prohibitionists are deliberately misrepresenting the facts. For this there is absolutely no justification; the Moderation League, which had presented the facts in striking form, gave them for what they were worth, and did not feel called upon to make any guess as to the relative strictness of the police in making arrests for drunkenness before and after Prohibition. And when Professor Fisher, for instance, makes this accu-

sation against the Moderation League, and puts on an air of such superior virtue, he ought to take care not to expose himself to the very same kind of charge that he sets up against the Moderation League.

He completely overlooks the fact that before Prohibition people drank their liquor in open saloons, and if they got drunk were apt to be conspicuously visible to the police; whereas now the drinking is done in homes and in obscure "speakeasies": Has Professor Fisher, or any of the Prohibitionist experts, tried to find out how many secret drunks there are now to every open drunk, and how the same matter stood in pre-Prohibition days? Perhaps the ratio of secret drunks to open drunks is 2¼ times as great as it was, and perhaps it isn't; but if it is, it knocks Professor Fisher's 2¼ to 1 ratio in the matter of arrests into a cocked hat.

My reason for making such extended comment on Professor Fisher is that he is a man of high standing as an economist and statistician, and his book *Prohibition at its Worst* has doubtless been accepted by many as an impartial and scientific study. It is with great regret that I feel it necessary to say that the book is nothing of the kind. The standards, in regard both to facts and to logic, which he would regard as absolutely binding on him in any question

of pure economics or statistics, he utterly disregards in this book; evidently his passionate ardor in the Prohibition cause completely submerges his scientific conscience.

Let me give but a single example of this—his treatment of the subject of arrests for drunkenness in New York City. In dealing with so important a matter, a scientific investigator would instinctively use every precaution to avoid hasty or superficial conclusions. But Professor Fisher does nothing of the kind. He points to the improvement since 1916, but he takes no notice of the *trend* of the arrests for drunkenness, as exhibited in his own graph and tables. These show that in 1911 arrests for drunkenness were 22,000, and that in 1916, in spite of the increase of population, they had fallen to 17,100. Mr. Fisher takes no notice of this; a scientific investigator would not only have taken notice of it, but would have looked up the figures of earlier years to see whether this trend was really significant. If Mr. Fisher had done this, he would have found that arrests for drunkenness in New York City had been 44,100 in 1905 and had been going down throughout the entire period from 1905 to 1916, when they had sunk to the figure above named, 17,100. If a like decline had been shown in Mr. Fisher's Prohibition period,—war-time restrictions 1917 to 1919, national

Prohibition since 1919—arrests for drunkenness in New York City would have gone down to zero by 1923, whereas there were actually (as Mr. Fisher states) 11,700 such arrests in 1923, and 12,000 in 1924. What checked the remarkable diminution in drunkenness in New York City that (according to the figures) had been going on for eleven years before the Prohibition period? I haven't the faintest idea what it was; but I know pretty well what Professor Fisher would say it was if the case were reversed.

From the amount of space that has been necessary for even a slight discussion of this simplest of the statistical questions in the case, the reader will understand how impossible it would be, in this little *A B C of Prohibition,* to examine into the merits of statistical arguments relating to more complex or difficult points.

How much alcohol is actually consumed in the country, for instance, is a more difficult point, because, from the nature of the case, there are no official figures to start with as a basis. Inferences have to be made from such data as the number of stills seized, the quantity of denatured alcohol produced and the probable proportion of this that gets bootlegged, the production of wine-grapes in California. Anti-Prohibitionists make out a formidable

case by pointing to the enormous number of stills seized; the very great increase, since Prohibition, in the quantity of denatured alcohol produced; the astonishing enlargement of the output of California grapes. From these data they deduce what look to me like reasonable estimates of the present consumption of liquor, and their conclusion is that there is more alcohol consumed by the American people today than there was before Prohibition. I am by no means sure that they are right in this conclusion; but I do not think it possible that their estimate is wildly erroneous. On the other hand, Irving Fisher makes an assertion on the subject which he rests upon a basis that is ridiculously inadequate—as any one can see by referring to his book, pp. 42-45. "It seems safe to conclude," he says, "that the total consumption [of alcohol for beverage purposes] today is less than 16 per cent of pre-Prohibition consumption, probably less than 10 per cent and possibly less than 5 per cent." This conclusion, I am sure, is wildly erroneous; but that does not trouble me half so much as the idea that a man of Professor Fisher's standing should be willing to tell his readers that the pitiful little reasons he assigns are sufficient to justify the conclusion.

When we come to the economic and social life of

the nation—prosperity, crime, vice, divorce, for example—the question becomes more intricate for many reasons; above all because in these things a vast number of factors are to be considered, of which Prohibition is only one. Considerations of space forbid my discussing any of these; but, so far as our main subject is concerned, there is little loss. The statistics of these things have proved nothing, either way, as to the effect of Prohibition upon them; to take them up might be interesting, but it would get us nowhere.

CHAPTER XVI

WAS THE AMENDMENT "PUT OVER"?

Prohibitionists constantly point to the big majority in Congress, and the promptness and almost unanimity of the ratification by the Legislatures, as proof of an overwhelming preponderance of public sentiment in favor of the Amendment. It is proof of no such thing.

Everybody knows that a large proportion of the members of Congress and State Legislatures who voted for the Prohibition Amendment were not themselves in favor of it. Many of them openly declared that they were voting not according to their own judgment but in deference to the desire of their constituents. But there is not the slightest reason to believe that one out of twenty of those gentlemen made any effort to ascertain the desire of a *majority* of their constituents; nor, for that matter, that they would have followed that desire if they had known what it was.

What they were really concerned about was to get the support, or avoid the enmity, of those who held, or were supposed to hold, the balance of power. The

Anti-Saloon League was the power of which Congressmen and Legislaturemen alike stood in fear. Never in our political history has there been such an example of consummately organized, astutely managed, and unremittingly maintained intimidation; and accordingly never in our history has a measure of such revolutionary character and of such profound importance as the Eighteenth Amendment been put through with anything like such smoothness and celerity.

A weapon not less powerful than political intimidation was the *moral* intimidation which the Prohibition propaganda had constantly at command. Throughout the entire agitation, it was the invariable habit of Prohibition advocates to stigmatize the anti-Prohibition forces as representing nothing but the "liquor interests." The fight was presented in the light of a struggle between those who wished to coin money out of the degradation of their fellow-creatures and those who sought to save mankind from perdition. That the millions of people who enjoyed drinking, to whom it was a cherished source of refreshment, recuperation, and sociability, had any stake in the matter, the agitators never for a moment acknowledged; if a man stood out against Prohibition he was not the champion of the millions who *enjoyed* drink, but the servant of the interests who

sold drink. This preposterous fiction was allowed to pass current with but little challenge; and many a public man who might have stood out against the Anti-Saloon League's power over the ballot-box cowered at the thought of the moral reprobation which a courageous stand against Prohibition might bring down upon him.

Thus the swiftness with which the Prohibition Amendment was adopted by Congress and by State Legislatures, and the overwhelming majorities which it commanded in those bodies, is no proof either of sincere conviction on the part of the lawmakers or of their belief that they were expressing the genuine will of their constituents.

And in connection with all this, we must note another thing that played a very important part. One of the shrewdest and most successful of the devices which the League and its supporters constantly made use of was to represent the function of Congress as being merely that of *submitting* the question to the State Legislatures; as though the passage of the Amendment by a two-thirds vote of Congress did not necessarily imply approval, but only a willingness to let the sentiment of the several States decide.

Of course, such a view is preposterous; of course, if such were the purpose of the Constitutional pro-

cedure there would be no requirement of a two-thirds vote. The Constitution says: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution." Thus Congress does not *submit* an amendment, but *proposes* it; and it does this only when two-thirds of both Houses deem it *necessary*.

But many members of Congress were glad enough to take refuge behind this view of their duty, absurd though it was; and no one can say how large a part it played in securing the requisite two-thirds of House and Senate. Yet from the moment the Amendment was thus adopted by Congress, nothing more was heard of this notion. On the contrary, the two-thirds vote (and more) was pointed to as conclusive evidence of the overwhelming support of the Amendment by the nation; the Legislatures were expected to get with alacrity into the band-wagon into which Congress had so eagerly climbed. Evidently, it would have been far more difficult to get the Eighteenth Amendment into the Constitution if the two-thirds vote of Congress had been the sole requirement for its adoption. Congressmen disposed to take their responsibility lightly, and yet not altogether without conscience, voted with the feeling that their act was not final, when they might otherwise have shrunk from doing what their judgment told them was

wrong; and, the thing once through Congress, Legislatures hastened to ratify in the feeling that ratification by the requisite number of Legislatures was manifestly a foregone conclusion. Thus at no stage of the game was there given to this tremendous Constitutional departure anything even distantly approaching the kind of consideration that such a step demands.

When people say that the Amendment was "put over," they usually lay chief stress on two points that I have thus far not mentioned at all. One is the use of a vast quantity of money by the Anti-Saloon League; the other is that the Amendment was put through Congress when two million of our boys were overseas fighting for their country. There is a good deal in both of these points; but I do not care to stress them, since they are familiar to everybody. Moreover, in my judgment, they are of less importance than the broad considerations that have been presented above, and one more consideration which is perhaps the weightiest of all.

This consideration is indeed connected with the fact that our boys were overseas fighting for their country; but it does not turn on any assumption as to what they would have said or done about Prohibition if they had been at home to talk and to vote.

The truth is that at the time the Prohibition Amendment was being put through Congress, it was not only our two million boys across the Atlantic who were in the war. The hearts and heads of all Americans were overseas, and filled with hopes and fears as the titanic struggle progressed, watching its every development, anxiously considering the possibilities of its final outcome. It was impossible, in this situation, for the country to give to the question of the Eighteenth Amendment the attention which otherwise might have been directed to its true character. Here and there a voice was raised to warn the country of the revolutionary character of the step it was about to take; but, in such a time as that, it was as the voice of one crying in the wilderness. The organized forces of the Anti-Saloon League, however, were directed as strenuously as ever to their great objective; indeed, more strenuously than ever; for it was their golden opportunity, and they knew it. While the rest of us were giving all our thoughts and prayers to the great issue that was being decided on the battlefields of France, the Anti-Saloon League pushed to a precipitate conclusion its assault upon the Constitution of the United States.[1]

[1] I have said nothing of the claim so often made by Prohibitionists that, since the Congress which passed the Eighteenth Amendment was elected in 1916, and since the Amendment had been introduced before that time, the country, in electing that

Congress, voted on the question before we went into the war. To people who don't stop to think, the claim may seem plausible; a moment's consideration suffices, however, to show that there is nothing in it. In the election of 1916, nobody was thinking about Prohibition; neither party mentioned it in its platform; though we were not yet in the war, the war question was uppermost in everybody's mind; next in prominence to it were certain questions relating to labor and capital; and as for Prohibition, neither Republican nor Democratic campaign speakers, neither Republican nor Democratic nor independent newspapers, had anything to say about it. In short, the people were not thinking about Prohibition at all. To say that the Congress elected in 1916 was elected on that issue is sheer absurdity.

CHAPTER XVII

THE AMENDMENT IN CONGRESS

In the foregoing chapter, I pointed out that one of the shrewdest and most successful devices that the Anti-Saloon League and its supporters made use of was to represent the function of Congress as being merely that of *submitting* the Amendment to the State Legislatures; a view which is thoroughly false in itself, and which, moreover, was incontinently dropped by the Prohibitionists as soon as it had served its purpose in securing the required votes in Congress. After that, the passage of the Amendment in Congress by a two-thirds vote was triumphantly acclaimed as demonstration of the emphatic approval of the Amendment by the Senate and House of Representatives.

Passing the Buck

How important a part this strategy played in getting the Amendment put through Congress may best be seen by looking at the Congressional Record itself. Let me set down here a few extracts from the Record:

From the report of the Senate Judiciary Committee, recommending the passage of the Amendment:

> The true question for Congress to consider is not whether three-fourths of the States will ratify, after discussion and agitation, but whether the subject concerns the public welfare, and whether those who desire the submission of the resolution be of sufficient number to relieve the proceeding from the charge of triviality and inconsequence. Deciding upon grounds like these, your committee are impressed by the overwhelming importance of the subject to the Nation and to the world, and by the vast number, not to say the majority of the moral and intellectual forces of the country, which demand the submission of this joint resolution to the consideration of the States.
>
> We therefore report it favorably and recommend its passage.

From the report of the House Judiciary Committee, recommending the passage of the Amendment:

> There is probably no other constitutional amendment that has been submitted to the States in the past that has been petitioned for so largely, and it would seem that whatever may be the individual views of Members upon the merits of the moral question involved, the legislative duty to submit it is plain. Therefore, the question submitted by this report to the Congress is not whether the manufacture and sale, etc., of alcoholic liquors shall be prohibited but

whether the matter shall be submitted to the States for their determination.

Opening words of Senator Curtis, introducing the debate in the Senate:

> Mr. President, I ask unanimous consent for the present consideration of Calendar No. 61, being the joint resolution (S. J. Res. 17) proposing an amendment to the Constitution of the United States. I do this because within the last few days in debate Senators have announced that they would like to have this question settled, and the best way to settle it is to submit this amendment to the States.

Closing words of the speech of Senator Sheppard, Prohibitionist leader in the Senate:

> As I view the matter, the member of either branch of the American Congress who denies the power of amendment to the States, especially an amendment which vast numbers of the people desire the States to consider, violates the basic principles both of the Constitution and of popular government, repudiates the fundamental rights of the States and overturns the two most sacred privileges the people possess, the privileges of referendum and of petition.

Closing words of the speech of Senator La Follette, who was personally opposed to national Prohibition:

I shall, so long as I remain in public life, do all within my power to make the will of the people the law of the land.

I should be untrue to my convictions in support of democracy, if I did not vote to give the people a right to pass upon the pending amendment to the Constitution.

Opening words of the speech of Senator Cummins, Prohibitionist:

Mr. President, I do not intend at this moment to discuss the policy of prohibition. I may, if I have an opportunity, speak of it a little later, but I would vote to submit this amendment to the people or to the States even though I did not believe in the policy of prohibition. I believe it is the duty of Members of Congress, when they find there is a fair and reasonable demand upon the part of the people for an opportunity to express their opinions regarding an amendment to the Constitution, to submit it irrespective of our individual judgment or opinion upon the merits.

How tempting the refuge thus presented must have been to members of Congress who wished to shirk the responsibility of recording their own judgment on this portentous question, it requires no argument to show. Nor does any one need to be informed how numerous this class is. It was bad enough to have members voting dry and drinking wet; it was bad

enough to have members professing to approve the Eighteenth Amendment when in reality they disapproved it; but here they were given a way to vote for the Eighteenth Amendment without even *professing* to approve it!

Can any one say how many Senators, how many Representatives, availed themselves of this easy escape from the fulfillment of their duty as responsible statesmen? No: A large part of the vote in Congress for the Amendment was obtained on the ground that it was the duty of the Senate and House to leave the question to the State Legislatures; and when that had been accomplished a large part of the vote for ratification (*ratification,* be it noted by the way, not *adoption*) was obtained on the ground that the Senate and House had passed the Amendment by a two-thirds vote. Was there ever a prettier case of catching the coon "a-comin' and a-goin' "?

Some Notable Protests

It is a pleasure to record the fact that some voices were raised in solemn protest against this childish and degrading view of the function of Congress. And it is particularly a pleasure to note that some of these voices were those of Southern men; for in asserting the dignity and responsibility of members

of the nation's parliament they were upholding one of the finest traditions of the South.

Senator Underwood, of Alabama, said:

> The contention that the Members of Congress should abandon their individual responsibility on this subject under the idea that they can shift that responsibility to the shoulders of the people in the several States is so subversive of the spirit of representative government in relation to the most solemn responsibility that the Constitution itself places upon the Members of this body that it is difficult for my mind to grasp the viewpoint of those who believe they have the right to abandon their personal and representative responsibility to the legislatures of States which may or may not voice the sentiments of their constituencies.

Representative Small, of North Carolina, said:

> A high official of the Anti-Saloon League recently made this statement:
>
> "The Anti-Saloon League is not asking any member of Congress to declare that he is in favor of national prohibition, but simply that he shall not become an avowed exponent and protector of the liquor traffic by refusing to vote to allow the people of the Nation, by States, through their representatives, to determine this question in the manner provided therefor by the framers of the Constitution."
>
> This has been a familiar form of expression by

some of the advocates of this amendment. In other words, they contend it is the duty of a Member of Congress to vote for any proposed amendment if a considerable number of the voters of the country appear to favor same. There can be no more solemn duty imposed upon a Member than in determining his attitude toward a proposition to amend the Federal Constitution. Congress must initiate the amendment, and each Member must consider it in the light of his intelligence and patriotic judgment. We are not mere automatons to register the will of the Anti-Saloon League or any other organization of reformers. We are sworn to defend the Constitution as it stands, and it is our solemn duty to avoid any action which will impair or imperil the foundations of our Government. Any Member who votes for or against this amendment solely actuated by fear of his political fortunes has little comprehension of the fundamentals of our Government and is elevating his political preferment above the preservation of the essentials of sound democracy.

Representative Huddleston, of Alabama, made an impressive protest against the proposed departure from the spirit of our institutions. His opening words were:

I am a prohibitionist, but I am also a Democrat. I hold that the right of self-government is more important than prohibition—more important than anything else in the world.

It is exceedingly painful to me to find myself out of harmony with so many of my friends upon the prohibition question, men with whom I have been associated in church and social life and in movements for the public welfare, and for whose views I have profound respect.

And he closed his speech with this clear-cut declaration of principle:

I believe in prohibition. I look on it as a good thing, but I cannot vote to force it on communities remote from my own, of which I have no specific knowledge and in which I have no particular interest. In my own State we already have prohibition. The Federal amendment will be of no benefit to us. It will merely serve to inject the prohibition issue more fully into State politics. This will be harmful to Alabama. It will delay much-needed reforms and divert attention from grave public matters of more pressing concern to my State. Alabama through her legislature chose prohibition voluntarily. It was not forced upon us by other States. We accepted it deliberately, not as the result of outside dictation. I am willing to accord to the people of other States the same privilege that Alabama has asserted for herself; that is, to decide for themselves whether they will stop the sale of liquors. I should resent with all my soul any attempt upon the part of a combination of other States by amendment to the Federal Constitution or otherwise to force the liquor traffic upon the people of Alabama. Likewise I shall not take

part in an effort to prohibit such traffic in other States, the people of which desire that it should continue.

Drinking Not Made a Crime

In Chapter X, on "The Crime of Drinking," I said:

> The Eighteenth Amendment does not expressly make drinking a crime. It prohibits the manufacture, sale, or transportation of intoxicating liquors, not the drinking of them.
>
> But the prohibition of the drinking is of course its real purpose and effect. Making or selling is forbidden solely because it makes drinking possible. The crime against which the Eighteenth Amendment is directed is the crime of drinking.
>
> Yet if the Eighteenth Amendment had said in words what it says in effect, it would not have had a ghost of a chance of adoption. Just insert the two words "or drinking" in the Eighteenth Amendment, so as to make it read "the manufacture, sale, transportation, *or drinking* of intoxicating liquors . . . is hereby prohibited," and you have a proposal so plainly offensive to the instinct of liberty that it would have aroused immediate and effective opposition.

Since writing that chapter, I have come across a passage in the Congressional Record which furnishes interesting corroboration of this assertion. Corrobo-

ration is, indeed, hardly needed; but as the passage is not only interesting but amusing, and as I believe it has almost completely escaped notice, it seems well worth while to draw attention to it.

In the course of the debate on the Eighteenth Amendment, Senator Hardwick of Georgia offered an amendment which would make it prohibit the *purchase* and *use,* as well as the manufacture, sale and transportation of intoxicating liquors. In support of this motion, Senator Hardwick said:

> I have proposed by the amendment which has just been read to amend this section so that it shall read as follows:
>
> The manufacture, sale, purchase, use, or transportation—
>
> If the amendment I have suggested is agreed to, we will not only prohibit the manufacture, sale, transportation, and importation of intoxicating liquors for beverage purposes but also prohibit, if this article should be ratified by the requisite number of States, the purchase and use of intoxicating liquors.
>
> It is hard for me to see why it should be made unlawful to sell an article and not equally unlawful to buy it. It is hard for me to see why, if the manufacture and sale are to be forbidden, the purchase ought not also to come under the ban of the law. It is impossible for me to understand why, if it is to be unlawful to manufacture and to sell it, to buy

it and transport it, to import it or export it, it ought not also to be unlawful to use it.

Now, if we are going to perform this task thoroughly, if we are going to work it out completely, let us go the whole length while we are at it; let us prohibit not only the exportation, importation, transportation, and sale, but the purchase as well and if all those things are to be forbidden, let us forbid its use as well. That is complete prohibition, practical prohibition, and it seems to me those who are so anxious to give the people real prohibition ought to be willing to vote for the amendment; that is, if they are really for real prohibition.

Was this proposal received with delight by Senator Sheppard of Texas, the Prohibitionist leader? Not at all. On the contrary, he said:

Mr. President, I hope the amendment of the Senator from Georgia will be voted down. It is not necessary to the accomplishment of the purposes of the resolution. We should employ in the organic law as few terms as possible in order to reach the purpose we have in mind.

The amendment now framed prohibits the manufacture of intoxicating liquors within the limits of the Republic and the importation of such liquors into the Republic. It destroys the traffic in intoxicating liquors. With that object accomplished, use will cease and purchase will cease, and therefore it is unnecessary to have specific provisions as to purchase and

use embodied in the amendment. I trust the amendment of the Senator from Georgia will be rejected.

And then ensued this short but highly interesting colloquy:

Mr. Hardwick. Does the Senator state any specific objection to my amendment?

Mr. Sheppard. I say it is unnecessary, and I do not want to put any unnecessary language in the constitutional amendment.

That was all. The frightful burden which would be put upon the Constitution by the insertion of two unnecessary words was the only objection that Senator Sheppard made to Senator Hardwick's proposal. But the objection in his *mind,* and in the minds of all who wanted the Eighteenth Amendment adopted, was not a ridiculous objection to two harmless words, but a most serious objection to the dynamite with which the words were loaded. They wanted to make *drinking* a crime; but they did not dare to make the words of the law expressly say so.

And it is not entirely irrelevant to note that Senator Sheppard's complacency on the subject has not been altogether justified by the event. The Amendment has been in the Constitution seven years; but his prediction that "use will cease and purchase will

cease" is not fulfilled, and shows no sign of approaching fulfillment.

State Enforcement Acts

Ever since the Eighteenth Amendment went into operation, the Prohibitionists have insisted that it is the duty of the several States to pass laws of their own, paralleling the law passed by Congress to enforce the Amendment. In a later chapter, I shall discuss this question on its merits, and show that this notion of the duty of States is quite without justification. But before leaving the subject of the debate in Congress, I will quote a most remarkable statement made on the subject by Representative Webb, who was not only a leading Prohibitionist, but was acting as spokesman of the House Judiciary Committee in making the statement. Like the Hardwick-Sheppard episode, just treated, this statement of Mr. Webb's seems almost completely to have escaped notice; and it is not only interesting (like the Hardwick-Sheppard matter), but is of great practical importance.

Mr. Webb said:

> Mr. Speaker and gentlemen of the House, I believe I will take up your time but briefly in explaining the committee amendments to this resolution as

it passed the Senate. The first amendment adopted in the Judiciary Committee was the new section 2. As it passed the Senate it provided that the "Congress" should have the power to enforce this article by appropriate legislation. Most of the members, including myself, of the Judiciary Committee, both wet and dry, felt that there ought to be a reservation to the State also of power to enforce their prohibition laws. And therefore we amended the resolution by providing that the Congress "and the several States" shall have "concurrent" power to enforce this article by appropriate legislation. So the amendment reads:

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

I believe, regardless of our division on the dry and wet question, every Member will agree with us that this is a wise and proper amendment. Nobody desires that the Federal Congress shall *take away from the various States the right to enforce the prohibition laws of those States.* If we do not adopt this amendment from the committee there might be a fight in Congress every two years as to whether the States should be *given the right to help enforce this proposed article of the Constitution.* Because, as I see it, after the States have delegated to the Federal Congress power to do a certain thing, for instance to stop the manufacture and sale of alcoholic liquors for beverage purposes, the question is whether the State has not turned over to the Federal Congress *the exclusive right to enforce it.* (Italics mine)

So far, then, from asserting that it is the *duty* of the States to enact prohibition enforcement laws, Mr. Webb asserts that, in the absence of the "concurrent power" provision inserted in the Eighteenth Amendment, it would be doubtful whether they had even the *right* to enact such laws; the object of that provision, as explained by him, is solely to assure to them that *right*, and not in the least to impose upon them any *duty*.

In the light of this statement made by one of the leading Prohibitionists of the House and of the country, made by him as spokesman of the Judiciary Committee, and made in a formal explanation of the words of the Eighteenth Amendment, the charge that opposition to the enactment (or retention) of State enforcement acts is nullification of the Constitution becomes simply absurd.

CHAPTER XVIII

TESTS OF PUBLIC SENTIMENT

Very soon after the national Prohibition law went into effect, it became evident that the sentiment against it was far more widespread and far more intense than had been supposed, even by its opponents. When this fact came to be widely recognized, there arose a general desire to ascertain, in one way or another, the actual strength of this sentiment; and a number of the tests that have been applied to this end have been such as to arouse the keen interest of the whole country.

Some of these tests have been in the shape of questionnaires circulated by enterprising journals; of these by far the most important was the country-wide poll taken by the *Literary Digest* in 1922. In addition to tests of this nature, there have been a number of referendum votes taken in various States, at regular State elections; of these the most important was that taken in the State of New York at the November election in 1926, though several others have been highly significant.

Before saying anything about the results of these

tests, let me say a few words about an objection constantly made by Prohibitionists against resorting to such tests—and especially the referendum tests—at all.

"If you don't like the Eighteenth Amendment or the Volstead Act," they say, "the thing for you to do is to repeal it. Your magazine polls and referendum votes can't accomplish anything; they may show that a great many people don't like the law, but the law is the law until it is changed by the regular processes provided in the Constitution. You are trying to discredit the law because you know you can't get it repealed."

To answer this objection it is only necessary to do a little plain thinking. If the law is ever to be repealed, it will be because a sufficient number of sensible Americans will have come to the conclusion that the law is odious to a very large proportion of their fellow citizens. There is, to be sure, a considerable body of Prohibitionists who are so fanatical as to believe it their duty to insist upon retaining the law no matter how many of their fellow citizens regard it as an odious tyranny; but there are countless other persons who, while they may think that the law is in itself desirable, have sense enough to recognize that it ought to be repealed if it does not

command the fairly general assent of the people whose personal lives it undertakes to regulate.

If there is any principle upon which all recognized authorities on lawmaking are agreed, it is that a law regulating personal habits cannot be justified by anything less than an overwhelming majority of the people in its favor. Nor does it require any great juristic authority to tell us that; it is the evident teaching of common sense. Accordingly, nothing ought to be more welcome to Americans who have not bid farewell to their common sense than a test of the question whether national Prohibition really does command that assent of an overwhelming majority which is essential for its justification.

The *Literary Digest's* poll, though taken in 1922, still remains in many respects the most interesting and instructive of all the tests. The proprietors of that journal are unquestionably themselves in favor of Prohibition; but they have a long-established reputation for fairness, as well as thoroughness and skill, in carrying out nation-wide polls on public questions. Let us see then, exactly what the *Literary Digest's* poll showed.

The questions submitted were these:

A—Do you favor the continuance and strict en-

forcement of the Eighteenth Amendment and the Volstead Law?

B—Do you favor modification of the Volstead Law to permit light wines and beers?

C—Do you favor a repeal of the Prohibition Amendment?

The result of the poll was (in round thousands) 306,000 votes for enforcement, 326,000 for modification, and 164,000 for repeal.

It must be noted that the modification here proposed was no 2.75 per cent affair—no mere getting rid of the one-half of one per cent feature of the Volstead act—but a proposal "to permit light wines and beers." It was a proposal to nullify the Eighteenth Amendment as understood by all of its thorough-going supporters. How many of those who voted for modification of the law rather than repeal of the Amendment itself did so, not because they favored the Eighteenth Amendment, but because they considered modification of the Volstead Law the only practical recourse, may be inferred from the fact that the Ohio vote in the poll was 20,000 for enforcement, 17,000 for modification, and only 8,000 for repeal, although the people of Ohio, when the question of the ratification of the Eighteenth Amendment was submitted to them, had given a majority against ratification.

We have, then, in the *Literary Digest's* "main poll," 306,000 for national Prohibition as it is understood by practically all of its supporters, and 490,000 against it—38½ per cent in favor and 61½ per cent opposed. Two further points are to be mentioned in regard to the *Literary Digest* poll. The showing of successive weeks was so disappointing to Prohibitionists that it was urged that women were not sufficiently represented in the poll, and that with them the result might be very different. Accordingly, the *Literary Digest* made a separate poll of women, "selected at random from the voters' lists of cities, towns and country districts throughout the nation." The result, however, was not much more favorable to Prohibition, it giving 44½ per cent for enforcement, 36¾ per cent for modification, and 18¾ per cent for repeal.

On the other hand, as it was evident that the poll practically failed to reach the mass of wage-workers at all, the *Digest* took polls of certain representative manufacturing establishments, with the result that only 1,453 workers voted for enforcement while 10,871 voted for modification, and 4,955 for repeal—thus showing a majority of more than 10 to 1 against Prohibition as we have it. As examples of particular factories it may be mentioned that in the Campbell's Soups Factory the vote was 9 to 1, in Parke, Davis

& Co. 6 to 1, in the Edison works 20 to 1, against continuance of the present state of things.

These were the results arrived at by an impartial and careful poll taken five years ago; and all signs show that dissatisfaction with the Prohibition law is vastly more general now than it was then.

Let us now take a look at the results of referendum votes actually taken at regular State elections in November, 1926, and especially that taken in the State of New York. This vote is of exceptional significance not only because of the size and importance of New York but because of the intense interest that the referendum contest had aroused throughout the State.

The question submitted was as follows:

> Should the congress of the United States modify the federal act to enforce the eighteenth amendment so that the same shall not prohibit the manufacture, sale, transportation, importation or exportation of beverages which are not in fact intoxicating as determined in accordance with the laws of the respective States?

The average voter could not easily make out the exact purport of this question; but that made little or no difference as to the significance of the vote. For the question was one that could be answered only

by "yes" or "no," and every one knew that the only effect of the vote would be to show whether the people of the State of New York approved or disapproved of the Volstead act. Well, it turned out that 1,763,070 New York voters expressed disapproval and only 598,484 expressed approval; almost precisely three to one against the Volstead act. And of the 62 counties of New York State, all but 20 gave a majority on the wet side.

In Illinois, precisely the same question was submitted, with the result that 840,631 votes were cast on the wet side and 556,592 on the dry side of the referendum.

In the Far West, several States voted on referendum questions of various kinds relating to Prohibition. The result in California was a majority, but not a heavy one, for the dry side—565,875 to 502,258. In Montana, which one might suppose to be immovably dry, the wet side won by 83,231 to 72,982. In Nevada, although the total population of the State is very small, the vote is highly interesting, for two reasons. In the first place the question submitted was directly aimed at the Eighteenth Amendment itself, not merely at a particular law passed to carry out that Amendment; the result was a vote of 18,131 against the Eighteenth Amendment to 5,382 for it. And secondly this wet victory stands out as proof of

a most remarkable change of sentiment among the people of Nevada. In 1918, Nevada adopted State Prohibition by a vote of 13,248 to 9,060—so that nine years of experience have resulted in cutting the dry vote from 13 thousand to five thousand and swelling the wet vote from nine thousand to 18 thousand.

The State referendum votes cited, together with the unofficial but far more comprehensive poll of the *Literary Digest* of which I have given a summary, are a sufficient indication of the tests by which public sentiment on Prohibition has been tried since the Eighteenth Amendment went into effect. Many other data might be adduced, but a survey of them all would but strengthen the conclusion arrived at from these.

The question with which we started out was the vital question, Does national Prohibition really command that assent of an overwhelming majority which is essential for its justification? And it may be stated without hesitation that this question has been answered most decidedly in the negative. Indeed, the tests which have been made show far more than this. They make it very doubtful whether in the country at large there is any majority at all for national Prohibition in any form; they make it almost certain

that there is in the country at large a heavy majority against the Volstead act; and they make it altogether certain that there is a heavy majority against the Volstead act in certain large and highly important elements of the population.

CHAPTER XIX

MODERATE DRINKING AND MODERATE BURGLARY

Is there any way in which, without repealing the Eighteenth Amendment, we can legalize the manufacture and sale of light wines and of ordinary beer —I mean real beer, not 2.75 per cent. That is a question of law which I do not propose here to discuss.

But besides the question of law, there is another question connected with this proposal—a question of common sense. For, whenever the proposal is made to permit beer and light wines, many Prohibitionists not only invoke the sanctity of the Eighteenth Amendment, and the impossibility of repealing it, but also cry out against the proposal as in itself abhorrent. Everybody is familiar with the kind of thing they say; and they all say substantially the same thing. Their state of mind is best indicated by the question which is one of their favorite ways of putting their case in a nutshell. One comes across it continually, and evidently those who ask it think it is a complete knockout for the proposal. "You want

to permit light wines and beer," they say; "why don't you propose to permit light burglary or light forgery?"

Were it not that this question—or something equivalent to it—is so often asked, one would think that it was too silly to require attention. The answer is so evident that one would think it could not escape the intelligence of a child. The difference between drinking and burglary or forgery or arson is that everybody regards burglary and forgery and arson as inherently immoral acts, while hardly anybody regards drinking as immoral unless carried to excess. Even those who do regard moderate drinking as immoral base their feeling about it not on any immorality inherent in the moderate drinking itself, but on the danger that moderate drinking may lead to immoderate drinking. There is not the faintest resemblance between the question of permitting beer and light wines and that of permitting any form whatsoever of burglary, forgery, arson, embezzlement, or any other act that is inherently criminal or immoral.

I feel almost ashamed of setting forth a thing so obvious; but in arguing against Prohibitionist blindness it is sometimes necessary to descend to pretty low intellectual depths. There are, however, one or

two other aspects of this matter upon which it seems worth while to make a few observations.

When you put the ban of the law upon moderate drinking, you have to consider not only the evil that you are seeking to prevent, but also the deprivation that you are imposing upon multitudes of perfectly normal persons—honest, intelligent, useful, agreeable members of the community. There is not a single human being who cries out against the wrong you do him by not allowing him to indulge in a little stealing or a moderate quantity of arson; there are many millions of human beings who cry out against being deprived of what is to them a source of innocent enjoyment, of relaxation and good-fellowship. Since the dawn of history, drinking has been one of the great resources of mankind for mental and spiritual refreshment, one of the great quickeners of genial social intercourse. That drink has been the source of a vast amount of evil, none but a fool could deny; but there are many Prohibitionists who are not at all fools and yet who are blind to the fact that drink has been a great element in the enjoyment and the happiness of countless millions. They might recognize all this and still maintain—whether rightly or wrongly—that the evil so vastly outweighs the good as to justify the absolute prohibition of intoxicating drinks; what I am protesting against

is that they virtually ignore the good altogether. They impose upon millions of their fellow-citizens a serious deprivation, without giving the slightest thought to the nature or extent of that deprivation. Is it any wonder that their edict does not meet with meek acquiescence and supine obedience?

A great deal of indignation has been vented by anti-Prohibitionists on the one-half-of-one-per-cent feature of the Volstead act. They say it is a lie to class drinks containing one or two per cent of alcohol as "intoxicating liquors." I confess I cannot get up much indignation over this lie. The falsehood that troubles me is not in the letter of the law but in its spirit—not the falsehood that two per cent beer is an intoxicating drink, but the falsehood that intoxicating drinks are wholly and intolerably evil.

One more point as to moderate drinking may be worth a little attention. There is a class of writers on Prohibition who lay stress on the physical as distinguished from the moral side of the question of moderate drinking, and who give to their pronouncements an air of scientific authority. The most conspicuous of these is Professor Irving Fisher, of Yale University, a scholar of high and deserved repute in the field of economic theory and economic statistics. But when he deals with the subject of drink and Prohibition, his reformatory zeal gets such complete

possession of him as apparently to paralyze his intellect, and he talks the language not of the scientific man but of the Prohibitionist crusader. "So-called moderate drinking," he says, "merely means moderate intoxication. A mild drinker denies that he is drunk, if he does not stagger. But a man who has drunk one glass of beer is one-glass-of-beer drunk." Now, to what kind of intellect can this appeal as an argument? If you wish to coin the epithet "one-glass-of-beer drunk," there is nothing to hinder your use of that form of words; but the epithet is an epithet and nothing more. We all know that drinking one glass of beer produces a slight intoxication; this slight intoxication, or exhilaration, is precisely what the moderate drinker desires to have. The object of calling him "one-glass-of-beer drunk" is solely to put upon him the stigma attaching to the word "drunk"; it tells us no new fact, but puts upon a perfectly familiar fact a false color. The man who takes a grain of strychnine is a suicide; but there wouldn't be much sense in saying that the man who takes a tonic containing a hundredth of a grain of strychnine is a hundredth-of-a-grain-of-strychnine suicide.

Let us look at another passage in Professor Fisher's book, one in which he is dealing not with a secondary point, but with a central issue. In reply

to the objection to Prohibition as a restraint of personal liberty, he boldly declares that it is not a restraint of personal liberty, but an enlargement of it. He says:

> The mental worker who takes alcohol voluntarily puts a yoke upon himself. He limits the exercise of his faculties, for he cannot judge so wisely, will so forcefully, think so clearly, as when his system is free from alcohol. The athlete who takes alcoholic liquor is similarly handicapped, for he is not free to run so fast, jump so high, pitch a baseball so accurately as when his system is free from the drug. Any one who has become a "slave to alcohol" has lost the very essence of personal liberty.

To see the absurdity of this notion of personal liberty, it is only necessary, in the first place, to note that by a "slave to alcohol" Mr. Fisher means any one who is in the habit of drinking, however moderately; and secondly to consider the logical consequences of the doctrine he lays down. Drinking is not the only indulgence which results in an impairment of the power (or, as Mr. Fisher fantastically calls it, the liberty) to exploit one's faculties to their utmost possible limit. What Mr. Fisher says of drinking (for he is not speaking of drunkenness) may be said with equal truth of staying up late at night, reading absorbing novels, overeating or under-

eating, taking too much or too little exercise, getting excited over politics or religion—in short, failing in any respect to conform to the exact standards set by mechanical rules of hygiene. It is preposterous to represent "the essence of personal liberty" as involving any such hideous obligation. And even from the standpoint of concrete achievement, the whole idea is false. If indulgence in alcoholic drinks is so deleterious to the intellectual faculties, by what miracle are we to account for the work of the great philosophers and mathematicians and scientists and poets and painters and novelists and composers of wine-soaked and beer-sodden Europe? And how has it come about that our country, with its large infusion of teetotalers in the last two or three generations, has not shown its intellectual superiority over these "slaves of alcohol"?

CHAPTER XX

STATE ENFORCEMENT ACTS

A curious feature of the Eighteenth Amendment is clause 2, which reads as follows:

> The Congress and the several States shall have concurrent power to enforce this article [that is, the Eighteenth Amendment] by appropriate legislation.

I call it curious—and from the very start a great many people called it curious—because it is impossible to say what it means. Any State could, without this provision, pass a law of its own duplicating the Federal law, if it chose to do so; what additional power is here given, nobody seems to be able to say. But though it is difficult or impossible to say what the clause *does* mean, it is very easy to say what it does *not* mean: when the Constitution says that the several States shall have the *power* to enact certain legislation it certainly does not mean that they shall be under the *obligation* to do so.

Nevertheless, from the very beginning,[1] the Prohibitionists have declared it to be the duty of each State to pass laws of its own containing substantially

[1] But not during the debate in Congress. See Chapter XVII.

the same provisions as the Volstead Act—adding others still more rigorous if they chose. It would be too absurd, even for the most extreme Prohibitionists, to claim that this was demanded by the language of the Eighteenth Amendment; they usually rest their case, therefore, upon more general grounds—upon the plea that it is the duty of every State to do everything in its power to help in the carrying out of any provision of the Federal Constitution.

To show satisfactorily the hollowness of this general plea would require more detail than I can enter into;[2] it will, I trust, be equally enlightening, as well as more to the purpose, to center our attention upon the particular case in hand—the question whether it is the duty of every State, no matter what its own

[2] It is worth while, however, in this connection, to make one remark. A main purpose of the Fourteenth Amendment, and the sole purpose of the Fifteenth Amendment, was to assure to the negroes in the Southern States the exercise of the suffrage. What has been done towards the carrying out of this purpose? Nothing whatsoever—not only nothing by the Southern States themselves, but nothing by the Congress of the United States. Yet the people who keep everlastingly insisting on the duty of the States to help in all possible ways to fulfill the purpose of the Eighteenth Amendment are totally deaf and dumb concerning the fulfillment of the purpose of the Fourteenth and Fifteenth Amendments. They look on with entire indifference at the inaction even of Congress; and the idea of demanding that South Carolina or Mississippi or Alabama should pass State laws to assure to the negroes the exercise of the elective franchise never crosses their minds.

feeling may be about Prohibition, to pass an enforcement act of its own—an act branding and punishing as a crime against the State whatever the Volstead Act brands and punishes as a crime against the United States.

Nearly all the States passed enforcement acts with the same thoughtless haste with which they ratified the Eighteenth Amendment; and when a law of this kind once gets on the statute books it is very difficult to get it repealed. Even in the State of New York, where public sentiment is overwhelmingly against the Volstead act, it required a most intense and prolonged effort to repeal the enforcement act—the Mullen-Gage act—which was passed in the first flush of the ratification victory. This was partly because of the gross over-representation of the rural districts in the Legislature; but a great additional difficulty lay in the false notion that it was somehow the Constitutional duty of the State to back up the Federal law with a corresponding State law.

In the campaign for the repeal of the Mullen-Gage act, the greatest stress was laid upon the grievance of double jeopardy—the circumstance that with a State law duplicating the Federal law the self-same act on the part of an individual exposed him to two separate and distinct prosecutions, one for

violation of the State law and one for violation of the Federal law. The Constitution of the United States provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb"—in other words that if a man has been once tried and acquitted on a criminal charge, he shall not again be tried for the same offense; but it has been held by the courts that the same *act*, if it be an offense against a State law and also against a Federal law, is not the same *offense*. Accordingly, advocates of repeal of the Mullen-Gage act concentrated nearly all their efforts upon showing this odious consequence of the duplication of the Federal law by a State law—that a man might be (and has been) prosecuted a second time on the very same charge (though technically a different one) of which he has once been acquitted; and the feeling aroused upon this point was probably the chief factor in bringing about the repeal. This was legitimate political warfare; but while the point itself was well taken and shrewdly pushed, the real sentiment behind the repeal movement rested on far more fundamental grounds.

The Eighteenth Amendment violates the basic principles of our Federal Union by putting into the Constitution a regulation of personal habits which,

if the States mean anything at all, should be left within their province; and it puts beyond the reach of even a majority of the whole nation any relaxing of that tyrannical bond.

In this situation, is it the duty of any State, regardless of its own desires, to pass laws for the enforcement of the Eighteenth Amendment? It is not a legal duty, for no such obligation is imposed on the States either by the Eighteenth Amendment itself or by any other provision of the Constitution. And it is no more a moral or patriotic duty than it is a legal duty.

So long as the State does all that is expressly required of it by the Eighteenth Amendment, it commits no offense against the *letter* of the Constitution in refusing to do more; and by such refusal it does the greatest possible service to the *spirit* of the Constitution. Such refusal is the only effective means by which the States can formally register their protest against the atrocity of the Eighteenth Amendment; and to make such protest in all lawful ways is the duty of every State whose people have been awakened to a consciousness of that atrocity.

The plea is frequently made that "loyalty to our political system" requires the enactment of State laws paralleling the Federal Prohibition law, the

Volstead act. But the plea is utterly unsound, apart from any objection peculiar to the Eighteenth Amendment or the Volstead act.

An act of the Legislature of the State of New York is an expression of the will of that Legislature or of the people of the State whom that Legislature represents. If there has been passed by Congress a law which the Legislature does not approve, the respect which the Legislature owes to an act of Congress does, indeed, forbid the passing of a State law contradictory to the Federal law. But there the obligation ends. A State Legislature that enacts a law which it does not itself approve, simply because Congress has passed it, is not showing its "loyalty to our political system," but on the contrary is committing an act of disloyalty to one of the most vital elements of our system. If there is anything whatever in the idea of State autonomy, surely the least that can be claimed for it is that when a Legislature enacts a law it shall record its own will and not the will of Congress.

Was it the duty of the Legislature of Massachusetts, in pre-Civil War days, to enact a Fugitive Slave law making the harboring of an escaped slave a crime against the Commonwealth of Massachusetts?

If, under the sway of some fierce anti-Catholic

delusion, a Constitutional amendment were passed forbidding the exercise of the Roman Catholic religion, would it become the duty of the State of Maryland to enact a law making it a penal offense to say or hear mass?

No: it may be the duty of a State to submit to the rod of Congress, perhaps to kiss the rod; but surely she cannot be asked herself to present the rod which is to be laid on her back.

CHAPTER XXI

NULLIFICATION OR REPEAL?

At the end of seven and a half years, the Eighteenth Amendment finds the country divided into two hostile camps, each comprising about half the entire population of the United States. The opposition, so far from dying out, has steadily become more pronounced, more insistent, more universally recognized. Nothing at all comparable to this situation has existed in this country since the slavery issue was settled. And even the slavery issue—until it took on the form of our great Civil War—did not enter into the daily life of the people, did not affect their habitual attitude toward the authority of law and government, as does the Prohibition issue.

The conflict which the Eighteenth Amendment has aroused will never culminate in a war of powder and shot, of blood and iron; but on the other hand it is itself a real war—a war carried on in a thousand little ways, a war waged every day, a war in which the government and the law, representing the will of one half of the people, is arrayed against tens of millions of individual citizens representing the re-

sistance of the other half of the people. No American can look with complacency upon this spectacle; every American must feel that a situation so abnormal, so fraught with danger to the very foundations of our national life, cannot be suffered to continue.

From this situation there is no escape in a mere modification of the Volstead act, so long as it conforms strictly to the dictate of the Eighteenth Amendment. One such modification, upon which a considerable amount of attention has been centered, is a change in the percentage of alcohol allowed—so that the law would permit beverages containing 2.75 per cent of alcohol, on the ground that such beverages are not intoxicating. This would be a victory over the Anti-Saloon League, and might be desirable as a sign that the Prohibitionist tyranny had lost its strangle-hold on the nation; but it would not in itself have any value at all. To fight hard and long to get such a concession as this—to get permission to drink beer that is not beer and wine that is not wine —is surely not an undertaking worth the expenditure of any great amount of civic energy. It would give very little satisfaction to those who care for drink, and no satisfaction at all to those who are concerned for the principles of liberty and rational government. It would therefore do nothing whatever towards bringing to an end the appalling con-

ditions with which we have become so familiar. The essence of the trouble is not in any faults or extravagances of the Volstead act, but in the Eighteenth Amendment itself.

Now what are we to do about an article of the Constitution that results in so horrible a situation? "Enforce it or repeal it," many people say. It is an easy thing to say. But suppose we can't repeal it? Suppose that the more rigorously you enforce it, the more odious become the means of enforcement? Shall we sacrifice everything we hold dear for the sake of persisting in forcing this measure upon a vast minority, very likely an actual majority, of the people?

No, besides enforcement and repeal there is another course. Call it nullification if you will; there are times when a course for which we have perhaps no better name than nullification is the only remedy for intolerable evil or intolerable wrong. Such was the case with the Fugitive Slave law; such was the case with the Negro Suffrage amendments in the South. Whether by formal nullification through the State Legislatures or by the direct action of the people, these laws were practically nullified, one of them in the North, the other in the South. In the case of Prohibition we have to look squarely in

the face the fact that, whether we like it or not, we are going to have nullification of the one kind or the other. Either Congress must give us relief by some form of what all good Prohibitionists will call nullification, or we must continue to have the nullification that we now have by the spontaneous action of tens of millions of individual Americans, from the Atlantic to the Pacific and from the Great Lakes to the Gulf.

You can't get fifty million individuals *voluntarily* to obey a law which they don't respect; and you can't *force* them to obey it without sacrificing everything that has made and kept us a free people. But can you not get them to respect it? somebody may ask. The time has been when possibly that question might have been asked with some degree of hopefulness. That time is now long past. Has anybody given the slightest heed to the solemn appeals of the Committee of 1000, or Attorney General Sargent, or President Coolidge, or anybody else, that we should respect this law because it is in the Constitution?

It has degraded the Constitution. It has disastrously impaired in the hearts of millions of good citizens that instinctive attachment to the Constitution which is one of the country's greatest safeguards. Among countless thousands of men who are

not good citizens it has enormously increased that disrespect for the laws in general which they already entertained. Who shall measure the evil that has thus been generated?

Although our ultimate goal must be the repeal of the Eighteenth Amendment, we must endeavor, at a much earlier time than this can be achieved, to get Congress to pass a law which shall really and truly relax the rigors of the Volstead act. Whether such a law should take the shape of permitting beer and wine—real beer and real wine, no 2.75 per cent make-believe—or should take the shape of a transfer of discretion to the separate States, such as is proposed in the referendum recently passed upon by the people of New York and of Illinois, or such as has long been embodied in the Democratic platforms of the State of Maryland, is a question which I need not particularly discuss.

In either of these ways a great breach would be made in the solid wall of bone-dry national Prohibition. That a real measure of relief of this kind would go far towards lessening the immediate evil of the existing situation I feel confident; and this in itself would be a sufficient reason for adopting it. But in my opinion an even more important result of it would be that it would bring repeal of the

Amendment into something like hailing distance.

Stupendous as are the difficulties in the way of that repeal, impossibility is no longer the word for it, as it seemed to be seven years ago, or five years ago, or perhaps even two years ago. In spite of their present infatuation, there are reserves of intelligence and patriotism among the Prohibitionists themselves. When it has been clearly shown that the Eighteenth Amendment is repugnant to the sentiments of half their fellow-citizens, I entertain the hope that many of their best and most earnest leaders will have the wisdom to recognize, and the courage to declare, that the Amendment was a disastrous error, and that the time has come to retrace the step into which their enthusiasm had betrayed them.

CHAPTER XXII

CUT OUT THE CANCER!

The Eighteenth Amendment is a morbid excrescence upon our Constitution. It is a revolutionary measure, of which the seriousness and the far-reaching consequences were not realized, even by its opponents, except a very few, until it had been fastened upon the country. It has generated disrespect for law upon a scale unheard of either in our own experience or in that of any other great nation of freemen. It is eating at the very vitals of our public life. We must not rest satisfied until we have cut this cancerous growth out of our body politic, whether it takes five years or ten years or fifty years.

In the fight that is before us, there is now ample reason for us to take courage. Every year adds to the number of those who realize the gravity of the issue, and who make their voices heard by their fellow-citizens. Some such voices were raised in protest and warning from the beginning; in a preceding chapter I have quoted from a few of the utterances in Congress which were worthy of the occasion. But

where there was one to raise such a voice before the deed was done, there are a score now that its evil nature has been brought home to us by experience; and where there was one to listen then there are a hundred to listen now. Even in the churches which most eagerly welcomed the adoption of the Eighteenth Amendment as a moral victory there is a growing disposition to recognize that it was a civic calamity.

For the predicament in which the nation finds itself, it is idle to blame the people who do not supinely bow down to a legislative atrocity. The people are the same for whom our Constitution and our laws were made during four generations of American history; the change does not lie in them, but in the preposterous enactment to which they have been fatuously asked to submit without a murmur. It was upon the apparent hopelessness of any attempt to repeal the Eighteenth Amendment that the Prohibitionists relied for the permanence of their law, and for general obedience to its requirements. They thought that they would make Prohibition as strong as the Constitution; it never occurred to them that what they were actually doing was making the Constitution as weak as Prohibition.

"I know not how to frame an indictment against

a whole people" is one of the most familiar of quotations. It is especially familiar in America, for it was in championing the cause of America in the British Parliament that Edmund Burke made his famous declaration. It is commonly quoted as though it signified that to make an accusation against a whole people, to charge a whole people with some moral or intellectual defect, were a thing that could not or ought not to be done. But that was not at all Burke's meaning.

It was in his great speech on conciliation with America that Burke made that declaration. He had been demonstrating the impossibility of changing the spirit of the American colonists in their resistance to obnoxious British laws; and he then proceeded to show that it would be likewise impossible "to prosecute that spirit in its overt acts as criminal." "The thing," he said, "seems a great deal too big for my ideas of jurisprudence. . . . I do not know the method of drawing up an indictment against a whole people." Clearly, therefore, it was not criticism or reproof of a whole people that Burke was pronouncing impossible, but actual governmental prosecution of a whole people for what that people did not regard as a crime.

The situation that confronts us today in regard to Prohibition is only too closely analogous to that

which Burke had before him when he made that memorable declaration.

It was, of course, not literally true that *all* of the American colonists resented as tyrannical the Acts which George III and his Parliament were attempting to enforce; nor was it necessary that this should be true in order to justify Burke's phrase. The point of it was that a vast body of British subjects in America—whether somewhat more than half or less than half does not matter—considered their rights as freemen to be tyrannically invaded by those Acts; a state of things wholly different from that in which these sentiments are entertained only by scattered individuals.

And precisely that state of facts exists today throughout a large part of our country, and in many of our States it exists to a degree fully equal to that in which it existed in the American colonies in 1775. It is a state of facts which cannot be successfully dealt with by the ordinary processes of law. A hundred and fifty years ago it bred a condition of bitterness and resentment which culminated in the American Revolution. Today it is breeding a condition of bitterness and resentment which will not culminate in armed rebellion, but which is poisoning our civic life, and which will continue to do so until the cause is removed.

Just as George III, and the British Tories generally, failed to understand the situation which had been created by the Stamp Act, so our Prohibitionists fail to understand the situation which has been created by the Eighteenth Amendment. The resentment it has aroused, the resistance with which it has been met, they look upon as a perverse and wanton disregard of the obligations of law. "Shall we from now on," exclaims a leading Prohibitionist, "proceed on the principle of every man doing that which is right in his own eyes, regardless of his duties to the organized society in which he lives and which he is supposed to uphold by his allegiance?" And he follows up this indignant inquiry by the assertion that "all law stands or falls together."

Both the inquiry and the assertion are worth considering.

There is no sort of resemblance between "every man doing that which is right in his own eyes" and a vast, resolute, determined protest, based on broad principles which in the past have commanded the unquestioning allegiance of freemen generally. This ought to be evident to any thinking person; but if there were room for doubt, it would only be necessary to ask when anything like what we are now witnessing in the case of national Prohibition had been seen before in the history of our country. If the resent-

ment and resistance which the Eighteenth Amendment arouses rested merely on a readiness to flout any law which any given individual found objectionable, how does it come that it is only since the Eighteenth Amendment was enacted that the country has been confronted with any such fearful conflict between the law on the one hand and the sentiments and actions of something like half of our citizens on the other?

It is true that this resentment, this resistance, this contempt for one law, does tend to bring all laws into contempt; and that is undoubtedly one of the worst results of the Amendment. But it is by no meas true that "all law stands or falls together." It never has been true; there has always been a difference in the degree of respect accorded to laws that are wise and laws that are unwise, to laws that are recognized as falling within the proper limits of governmental authority and laws that are felt to be tyrannical extensions of that authority beyond its legitimate bounds. But never has that contrast been exhibited on so colossal a scale, and with such enormous potentialities of mischief.

If, however, it were true that "all law stands or falls together," then the case against the Eighteenth Amendment would be even stronger than it is.

For if all law stands or falls together, then to en-

act a law which arouses the intense hostility of something like half of the people to whom it is to be applied, a half in no wise distinguished from the other half by any moral inferiority or mental deficiency, is to assume an appalling load of responsibility; and to enact such a law in the shape of a Constitutional requirement of which the repeal is supposed to be practically impossible is to make that load of responsibility even more appalling.

There is one and only one thing that could justify such a violation of liberty and of the cardinal principles of rational government as is embodied in the Eighteenth Amendment. In the face of desperate necessity, there may be justification for the most desperate remedy. But so far from this being a case of desperate necessity, the evil of drink had been steadily diminishing. Not only during the period of Prohibition agitation, but for many decades before that, drunkenness had been rapidly declining, and both temperate drinking and total abstinence correspondingly increasing. It is unnecessary to appeal to statistics. The familiar experience of every man whose memory runs back twenty, or forty, or sixty years, is sufficient to put the case beyond question; and every species of literary and historical record confirms the conclusion. This violent assault upon

liberty, this crude defiance of the most settled principles of lawmaking and of government, this division of the country—as it has been well expressed—into the hunters and the hunted, this sowing of dragons' teeth in the shape of lawlessness and contempt for law, has not been the dictate of imperious necessity, but the indulgence of the crude desire of a highly organized but one-ideaed minority to impose its standards of conduct upon all of the American people.

To shake off this tyranny is one of the worthiest objects to which good Americans can devote themselves. To shake it off would mean not only to regain what has been lost by this particular enactment, but to forefend the infliction of similar outrages in the future. If it is allowed to stand, there is no telling in what quarter the next invasion of liberty will be made by fanatics possessed with the itch for perfection. The time to call a halt is now; and the way to call a halt is to win back the ground that has already been lost. To do that will be a splendid victory for all that we used to think of as American —for liberty, for individuality, for the freedom of each man to conduct his own life in his own way so long as he does not violate the rights of others, for the responsibility of each man for the evils he brings upon himself by the abuse of that freedom. May the

day be not far distant when we shall once more be a nation of sturdy freemen—not kept from mischief to ourselves by a paternal law copper-fastened in the Constitution, not watched like children by a host of guardians and spies and informers, but upstanding Americans loyally obedient to the Constitution, because living under a Constitution which a people of manly freemen can whole-heartedly respect and cherish.

THE END

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